premature to cancel the agency when the appeal was pending before the court. The question is whether there was excess of jurisdiction. In this context "jurisdiction" merely means legal authority or power. Had the customs officer the power to cancel the agency if the agent "commits" a breach of the Customs Act? In this context "commits" means "convicted". Giving the word that meaning, I can say with confidence that it is only if an agent is convicted of an offence under the Customs Act that his agency is liable to be suspended or cancelled. I think it is against the public interest to wait after the final determination of an appeal to cancel the agency, especially when there is no stay of execution. In the circumstances I conclude that it was within the power of the customs officer to cancel the agency when the respondent was convicted of the two offences under the Customs Act. There was therefore no excess of jurisdiction. There was also no error of law on the face of the record because the customs officer had not misconstrued the law.

Gill C.J. (Malaya) and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Morris Edgar & Co.*

DATUK HAJI HARUN BIN HAJI IDRIS v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Ali Hassan and Wan Suleiman F.JJ.) March 21 to 25, 28 to 31, April 1 to 4 and 6, June 10, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 19 of 1976]

Criminal Law and Procedure — Transfer of case from subordinate court to High Court on certificate of Attorney-General — Whether legal — Whether section 418A Criminal Procedure Code ultra vires the Constitution — Corruption — Admission of statement to police — Evidence of other possible offences, wrongly admitted — Evidence of system — Evidence Act, 1950, ss. 15, 24, 29, 54 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 138, 177, 417 and 418A — Federal Constitution, Articles 4(1) and 8.

Bribery and Corruption — Whether accused solicited gratification — Whether gratification was solicited corruptly — Gratification solicited as inducement to obtain approval of application for State land — Whether accused solicited and accepted money corruptly — Whether accused "agent" — Prevention of Corruption Act, 1961, ss. 3, 4 and 9.

Constitutional Law — Legislation giving discretion to Attorney-General to issue certificate for transfer of case from subordinate court to High Court — Whether contrary to Federal Constitution — Right to Equality — Federal Constitution Articles 4(1) and 8.

This was an appeal from the decision of Raja Azlan Shah J. ([1977] 1 M.L.J. 15). The appellant had been convicted on three charges of corruption, in that he as Mentri Besar of Selangor (a) solicited the sum of $250,000 for U.M.N.O. as an inducement to obtain the approval of the Executive Council in respect of an application for a piece of State land; (b) being a member of a public body accepted for U.M.N.O. the sum of $25,000 as inducement to obtain such approval and (c) accepted for U.M.N.O. the sum of $225,000 as an inducement to obtain such approval.

The learned trial judge sentenced the appellant to one year's imprisonment in respect of the first charge and 2 years' imprisonment in respect of each of the second and third charges, all the sentences to run concurrently. He also ordered payment of the sum of $225,000 to U.M.N.O. Selangor. The appellant appealed.

On appeal it was argued (a) that section 418A of the Criminal Procedure Code (under the provisions of which the case of the appellant had been transferred from the subordinate court to the High Court for trial) was inconsistent with Article 8 and therefore unconstitutional and void by virtue of Article 4; (b) that the verdict was not supported by such evidence as was admissible.

Held: (1) section 418A of the Criminal Procedure Code is not discriminatory, as although it uses the words "any particular case" it does not apply specifically to the particular case against the accused. The section applies to all criminal cases triable in a subordinate court;

(2) a preliminary inquiry is not a fundamental right guaranteed by the Constitution; if the accused had been tried in the Sessions Court he would not have had the use of depositions before trial; and at the trial in the High Court he also enjoyed the chance of not being called upon for his defence at the close of the case for the prosecution. By being tried in the High Court he did not run the risk of greater penalty, for if he had been tried in the Sessions Court he would have been liable to the full penalty prescribed by law. In any event the trial in the High Court followed the same rules of procedure and evidence as would have been followed in the Sessions Court and so there was no question of the accused being denied a fair and impartial trial. The accused also had a right of appeal and a provision for appeal, it has been held in the Indian cases, may cure any defect in the law;

(3) even if (contrary to the view of the court) the law may be regarded as discriminatory, there was reasonable classification in it, there was a nexus between it and the object of the law and there was a principle or policy in it to guide the Attorney-General in the exercise of his discretion under section 418A. The Attorney-General when acting under the section 418A will be expected to transfer to the High Court only cases of unusual difficulty or of unusual importance. Sections 417 and 418A of the Criminal Procedure Code are vehicles for the Attorney-General to exercise his power under Article 145(3) of the Federal Constitution and it is for him to judge which case is difficult or important enough to be given an early trial after a transfer to the High Court under section 418A;

(4) it is obvious that the scheme of the amendments to sections 138, 417 and 418A is to expediate trials, and there is an obvious classification, a classification clearly connected with the underlying principle of administration of justice that an alleged criminal should be placed on trial as soon as possible after the commission of the crime as the circumstances of the case would permit and this classification cannot be regarded as unreasonable and not having a nexus with the object of the amendments, namely speedy trial;

(5) the statement made by the appellant to the officer of the National Bureau of Investigation was admissible by virtue of section 15(1) of the Prevention of Corruption Act, 1961, and also by virtue of section 29 of the Evidence Act which provides that if a confession is otherwise admissible, that is, if the court is satisfied that it is made voluntarily, it does not become inadmissible simply because it was made in answer to questions which he need not have answered whatever may have been the form of those questions;

(6) evidence relating to cheques paid by the appellant out of the U.M.N.O. Special Fund to his personal account was wrongly admitted and should not have been used to discredit the accused, but in this case there was, apart from that evidence, enough evidence to support the finding of guilt;

(7) evidence of the receipt of other donations received by the appellant was rightly admitted in evidence to rebut the defence that a voluntary and honest donation had been given in this case;

(8) there was enough evidence to support the conviction as the evidence showed that the appellant did solicit the $250,000 corrupty from the bank as an inducement for the Executive Council to approve the bank's application and that he did accept the two sums corruptly;

(9) in the circumstances of the case the appellant was an agent within the meaning of section 4(a) of the Prevention of Corruption Act and he was correctly charged on the alternative charges. However in the circumstances it would not be proper or expedient to order the appellant to be convicted under that section also;

(10) the penalty ordered by the learned trial judge should have been ordered to be paid to the Federal Government.

Cases referred to:-

(1) *Public Prosecutor* v. *Fan Yew Teng* [1973] 2 M.L.J. 1.
(2) *State of West Bengal* v. *Anwar Ali Sarkar* A.I.R. 1952 S.C. 75.
(3) *Ram Dial & Ors.* v. *State of Punjab* A.I.R. 1965 S.C. 1519.
(4) *Northern India Caterers (Private) Ltd.* v. *State of Punjab* A.I.R. 1967 S.C. 1581.
(5) *Suraj Mall Mohta & Co.* v. *A.V. Visvanatha Sastri & Anor.* A.I.R. 1954 S.C. 545.
(6) *Budhan Choudhry & Ors.* v. *State of Bihar* A.I.R. 1955 S.C. 191.
(7) *Shri Ram Krishna Dalmia & Ors.* v. *Shri Justice S.R. Tendolkar & Ors.* A.I.R. 1958 S.C. 538.
(8) *Kathi Ranning Rawat* v. *State of Saurashtra* A.I.R. 1952 S.C. 123.
(9) *Jyoty Pershad & Ors.* v. *Administrator for the Union Territory of Delhi & Ors.* A.I.R. 1961 S.C. 1602.
(10) *M. Chhagganlal* v. *Greater Bombay Municipality* A.I.R 1974 S.C. 2009.
(11) *Karam Singh* v. *Mentri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129, 141.
(12) *Public Prosecutor* v. *Khong Teng Khen* [1976] 2 M.L.J. 166.
(13) *Charanjit Lal Chowdury* v. *The Union of India* A.I.R. 1951 S.C. 41.
(14) *Public Prosecutor* v. *Oh Keng Seng* [1976] 2 M.L.J. 125.
(15) *Public Prosecutor* v. *Su Liang Yu* [1976] 2 M.L.J. 128.
(16) *Macherla Hanumantha Rao & Ors.* v. *The State of Andhra Pradesh A.I.R.* 1957 S.C. 927.
(17) *Matajog Dobey* v. *H.C. Bhari* A.I.R. 1956 S.C. 44.
(18) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.
(19) *Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.
(20) *A.G. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] Q.B. 629.
(21) *Chye Ah San* v. *Reg.* [1954] M.L.J. 217.
(22) *Heah Chin Kim* v. *Public Prosecutor* [1954] M.L.J. xxxiii.
(23) *Yii Kim Hai* v. *Reg.* [1955] M.L.J. 161.
(24) *Public Prosecutor* v. *Law Say Seck & Ors.* [1971] 1 M.L.J. 199.
(25) *Rex* v. *Lim Ah Seng* [1931] S.S.L.R. 178.
(26) *Rex* v. *Santokh Singh* [1933] M.L.J. 178.
(27) *State of Bombay* v. *Kathi Kalu* A.I.R. 1961 S.C. 1808.
(28) *Rex* v. *Ellis* [1910] 2 K.B. 746.
(29) *R.* v. *Cohen* [1938] 3 All E.R. 380.
(30) *Noor Mohamed* v. *The King* [1949] A.C. 182.
(31) *The King* v. *Baskerville* [1916] 2 K.B. 658.
(32) *Chiu Nang Hong* v. *Public Prosecutor* [1965] 1 M.L.J. 40.
(33) *Regina* v. *Jones* (1965) British Columbia L.R. 303.
(34) *Wee Toon Boon* v. *Public Prosecutor* [1976] 2 M.L.J. 191.
(35) *Regina* v. *Barrett* [1976] 3 All E.R. 895.
(36) *Henley* v. *Mayor & Burgesses of Lyme* (1828) 5 Bing. 91, 130 E.R. 995.
(37) *King* v. *Whitaker* [1914] 3 K.B. 1283.
(38) *Rex* v. *Vaughan* (1769) 4 Burr. 2495, 98 E.R. 308.
(39) *Mohamed bin Long* v. *Public Prosecutor* [1972] 1 M.L.J. 76.
(40) *Lee Mun Foong* v. *Public Prosecutor* [1976] 2 M.L.J. 16.

R.R. Chelliah (*Sri Ram, Haji Suhaimi* and *P. Vijendran* with him) for the appellant.

Tan Sri Dato' Haji Mohamed Salleh bin Abas (Solicitor-General) and *Abu Talib bin Othman* (Deputy Public Prosecutor) for the respondent.

Hearing: March 21 to 25, 28 to 31, April 1 to 4 and 6, 1977.

Suffian L.P. (delivering the judgment of the Court): This judgment, delivered with the consent of all concerned under section 42 of the Courts of Judicature Act, 1964, represents the view of my brother Tan Sri Wan Suleiman and my view. Our brother Tan Sri Ali Hassan unfortunately died on Friday, 27th May, without formally expressing any view. He had no time to finalise his view because prior to his death he had to go away to London for a month for medical treatment.

This is an appeal by the accused from a decision of Raja Azlan Shah F.J. (reported at [1977] 1 M.L.J. 15) convicting him on three charges as follows: —

"*First Charge:* That you between February 22, 1972, and July 24, 1972, in your office at Kuala Lumpur, then in the State of Selangor, corruptly solicited for a political party, namely, United Malays National Organisation (UMNO), a gratification, to wit, two hundred and fifty thousand dollars ($250,000) from the Hongkong and Shanghai Banking Corporation, Kuala Lumpur as an inducement to you, being a member of a public body, namely Government of the State of Selangor, to obtain the approval of the Executive Council of the Government of the State of Selangor in respect of an application of the said bank for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 3(a)(ii) of the Prevention of Corruption Act, 1961.

Second Charge: That you on or about August 16, 1972, at the Kuala Lumpur International Airport, Subang, in the State of Selangor, being a member of a public body, to wit, Mentri Besar Selangor, did accept from the Hongkong and Shanghai Banking Corporation a gratification, to wit, twenty-five thousand dollars ($25,000) cash through one Haji Ahmad Razali bin Haji Mohd. Ali as an inducement for your aiding in procuring the performance of an official act, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 9(b) of the Prevention of Corruption Act, 1961.

Third Charge: That you on or about March 27, 1973, in your office in Kuala Lumpur, then in the State of Selangor, being a member of a public body, to wit, Mentri Besar Selangor, did accept from the Hongkong and Shanghai Banking Corporation, Kuala Lumpur, a gratification, to wit, two hundred and twenty-five thousand dollars ($225,000) cash as an inducement for your aiding in procuring the performance of an official act, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 9(b) of the Prevention of Corruption Act, 1961."

and sentencing the accused to one year's imprisonment on the first charge and two years on each of the second and third charges, the sentences to run concurrently.

There is also a cross-appeal by the Public Prosecutor with which we shall deal in the proper place below.

We shall deal with the appeal first.

APPEAL

The grounds of appeal may be divided into two parts.

The first part relates to the constitutionality of section 418A of the Criminal Procedure Code, while the second part relates to the verdict itself which it is said is not supported by such evidence as was admissible.

We shall deal with the first part first.

FIRST PART

Is section 418A constitutional?

It is submitted on behalf of the accused that section 418A of the Criminal Procedure Code is inconsistent with article 8 and therefore unconstitutional and void by virtue of article 4.

Most of the time our attention was directed to clause (1) of article 8, but we think that it would be convenient to reproduce the whole of that article. It reads:

"8. (1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit —

(a) any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment in any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays."

As regards article 4, only clause (1) is relevant and that reads:

"4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

The accused was first brought and charged in the court of the Special President of the Sessions Court on 24th November, 1975. Then Parliament amended several sections of the Criminal Procedure Code by Act A324. That Act amended section 138 which had previously read: —

"138. The following procedure shall be adopted in inquiries before a Magistrate where the inquiry is held with a view to committal for trial before the High Court, and no person shall be tried before such court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter."

to read as follows: —

"138. The following procedure shall be adopted in inquiries before a Magistrate where the inquiry is held with a view to committal for trial before the High Court, and, except as otherwise provided in Chapter XLII [incorporating sections 417 and 418A], no person shall be tried before such court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter."

At this point it is convenient to reproduce also section 177 which was left untouched by Parliament; it reads:

"177. In any trial before a Magistrate in which it appears at any stage of the proceedings that from any cause the case is one which in the opinion of such Magistrate ought to be tried by some court of higher jurisdiction than his own, or if before or during such trial application is made by the Public Prosecutor, the Magistrate shall stay proceedings and transfer the case to such higher court or proceed under Chapter XVII with a view to the committal of the accused for trial by the High Court, and shall record such order upon the proceedings."

Act A324 also amended section 417. The old version read as follows: —

"417. Whenever it is made to appear to a judge —

(a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate to him; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or

(d) that an order under this section shall tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

he may order —

that any offence be inquired into or tried by any court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence; or

that any particular criminal case be transferred to and tried before himself; or

that a person committed for trial in one place be tried in another place."

The new version reads as follows: —

"417. (1) Whenever it is made to appear to the High Court —

(a) that a fair and impartial inquiry or tried cannot be had in any criminal court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code;

it may order —

(aa) that any offence be inquired into or tried by any court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence; or

(bb) that any particular case or class of cases be transferred from a criminal court subordinate thereto to any other such criminal court of equal or superior jurisdiction; or

(cc) that any particular criminal case be transferred to and tried before the High Court; or

(dd) that an accused person be committed for trial before the High Court, or

(ee) that a person committed for trial in one place be tried in another place.

(2) The High Court may make an order under subsection (1) either on the report of the lower court, or on the application of the Public Prosecutor or the accused person, or on its own initiative.

(3) (a) When an order is made under paragraph (cc) or subsection (1) the lower court before which the inquiry into, or the trial of, the offence against the accused person is pending shall,

(if the case is triable by the lower court) without holding a preliminary inquiry under Chapter XVII; or

(if the case is triable by the High Court and the preliminary inquiry under Chapter XVII is in progress or has not yet commenced when the order is made) without holding or completing such preliminary inquiry,

cause the accused person to appear or be brought before the High Court on the date specified in the said order or as soon as may be practicable if no such date is specified.

(b) When the accused person appears or is brought before the High Court in accordance with paragraph (a), it shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

(4) The court to which a case is transferred under this section may act on the evidence already recorded in an enquiry or a trial or partly so recorded and partly recorded by itself, or it may re-summon the witnesses and re-commence the inquiry or trial:

Provided that in any case so transferred the Public Prosecutor or the accused person may, when the court to which the case is transferred commences its proceedings, apply that the witnesses or any of them be re-summoned and re-heard."

At the same time the Act also added a new section 418A which reads as follows:

"418A. (1) Notwithstanding the provisions of section 417, the Public Prosecutor may in any particular case triable by a criminal court subordinate to the High Court issue a certificate requiring the court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.

(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.

(3) Upon receipt of the certificate, the court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of subsection (3)(b) and subsection (4) of section 417 shall apply to such case *mutatis mutandis*."

The explanatory statement attached to the bill introducing these amendments gave the objects and reasons of the amendments as follows: —

"Section 138... The amendment is designed to dispense with the need for a preliminary inquiry where a judge acting under section 417 transfers a case from a subordinate court to the High Court, or where the Public Prosecutor so certifies; and also deals with a case which would otherwise be triable by any criminal court subordinate to the High Court where the Public Prosecutor certifies that such case ought to be tried by the High Court.

Section 417... The section as it stands restricts the power of a judge in respect of the transfer of a case from a subordinate court. He can only transfer such a case to himself, and it is considered that he should be empowered to transfer it to the High Court to be tried not necessarily by himself but by any judge of the High Court happening to sit at the appropriate time."

There is no explanation for the new section 418A; because the section did not appear in the bill and was added during the Committee stage.

It is clear that part of Parliament's intention is to change the law laid down in *Public Prosecutor* v. *Fan Yew Teng*[1] by the Privy Council which held that where a case is transferred on the application of the accused from a subordinate court to the High Court, the trial in the High Court must be preceded by a preliminary enquiry and one that was not so preceded is a nullity.

The amending Act came into force on 10th January, 1976.

Acting under the new section 418A, the Attorney-General in his capacity as Public Prosecutor, on the very day that the new section came into force, issued a certificate requiring the Sessions Court to remove the case against the accused to the High Court.

On 12th January, 1976, when the accused next appeared in the Sessions Court, this certificate was produced, whereupon the President, acting under the new section, without holding a preliminary enquiry under Chapter XVII of the Criminal Procedure Code, transmitted the case to the High Court.

The accused's first appearance in the High Court was on 9th February, 1976, when the case was set down for hearing on 17th April, 1976. The last day of the trial was on 4th May, 1976, when judgment was reserved, and judgment was delivered on 18th May, 1976.

Summary of Mr. Chelliah's arguments.

Mr. Chelliah's argument that section 418A is unconstitutional, (supported by citations from numerous decisions of the Indian Supreme Court on the corresponding Article 14 of the Indian constitution, which provides "*Equality before law.* The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"), may be summarized as follows.

Equality before the law guaranteed by Article 8 does not mean that all laws must be general in character and universal in application. The legislature may make laws in respect of a group or a class of persons provided that the grouping or classification is —

(a) rational;

(b) founded on an intelligible differentia (distinguishing mark) which distinguishes persons that are grouped together from others that are left out of the group;

(c) there must be a policy or object sought to be achieved by that Act; and

(d) there must be a nexus between the basis of classification and the object of the Act.

Five types of situations may arise when considering whether a law infringes Article 8:

(i) The Act itself may make a rational classification based on an intelligible differentia with a nexus with the object or policy of the Act. The Act is valid.

(ii) The Act may not make any classification but leaves it to the executive authority to do so with proper guidance as to how to classify, laying down a policy or principle. The Act is valid.

(iii) The Act may not make any classification but leaves it to the executive authority with no guidance by way of policy or principle, leaving it to the entire discretion to be exercised by the executive arbitrarily and without control. The Act is void.

(iv) The Act may make a classification but such classification may not be based on any intelligible differentia. The Act is void.

(v) The Act may not make any classification but leaves it to the executive with a proper guidance as to policy and principle, but the executive misuse their powers. Though the Act itself is valid, the exercise of power under it may be questioned.

Section 418A, it is said, comes under (iii) above.

The test of constitutionality is objective, not subjective. It is whether under the impugned law the executive could discriminate if it wanted, not whether the executive did discriminate. *State of West Bengal* v. *Anwar Ali Sarkar.*[2]

The principles stated above apply to both substantive and procedural law. Discrimination exists if there are two available procedures, one more drastic and prejudicial than the other and which can be applied arbitrarily. *Ram Dial* v. *State of Punjab.*[3] If two procedures are available and if a person is deprived of a potential and valuable privilege under one of the procedures, it is no defence to say that the discriminatory procedure also advances the cause of justice. *Northern India Caterers (Private) Ltd.* v. *State of Punjab;*[4] *Anwar Ali.*[2]

In considering section 418A, you cannot read into it section 417. *Suraj Mall Mohta & Co.* v. *A.V. Visvanatha Sastri & Anor.*[5]

Discretion given to an executive authority is not on the same footing as discretion given to a judicial authority. Discretion given to judges is not discriminatory. *Budhan Choudhry & Ors.* v. *State of Bihar.*[6] Discretion under section 417 is judicial discretion, whereas the Attorney-General's discretion under section 418A and Article 145(3) is executive.

In the light of the above principles, section 418A (it is said) is null and void, since it is discriminatory and offends Article 8. The amending Act does not state any object or principle. It does not classify (on the contrary it uses the words "in any particular case"). Even if these words classify, they do not reveal any intelligible differentia as between groups. The section opens the door to arbitrary exercise by the Public Prosecutor of his power (whether or not he will is immaterial). It deprives an accused person of his rights and privileges under sections 177, 417 and 418, C.P.C. It is more drastic.

If there are three different persons, namely, A, B and C, facing similar charges in similar circumstances, the Attorney-General can at his discretion choose to proceed —

(1) against A under sections 177 and 138, C.P.C.;
(2) against B under section 417; and
(3) against C under section 418A.

Against A there will be a Preliminary Enquiry.
Against B there may or may not be a P.E.
Against C there will be no P.E.

As regards B, he may object to the Attorney-General's application; there may be a P.E. held against him, in which case he has the chance of not being committed for trial; if he is committed for trial, he has depositions to make it easier for him to prepare his defence in the High Court.

As regards C, he loses all these privileges, and that is prohibited by Article 8.

Such in brief is Mr. Chelliah's argument for saying that section 418A is discriminatory contrary to Article 8 and therefore unconstitutional.

Indian decisions examined.

Among others Mr. Chelliah cites this long passage from *Shri Ram Krishna, Dalmia & Ors.* v. *Shri Justice S.R. Tendolkar & Ors.*[7] It is from the judgment of a five-judge court delivered by S.R. Das C.J. and gives a useful summary of the principles followed by the Indian Supreme Court when considering the validity of an Act of Parliament in the light of their Article 14.

"In *Budhan Choudhry* v. *The State of Bihar,* A.I.R. 1955 S.C. 191 a Constitution Bench of seven judges of this court at page 193 explained the true meaning and scope of Article 14 as follows:

'The provisions of Art. 14 of the Constitution have come up for discussion before this Court in a number of cases, namely, *Chiranjit Lal* v. *Union of India,* A.I.R. 1951 S.C. 41, *State of Bombay* v. *F.N. Balsara,* A.I.R. 1951 S.C. 138, *State of West Bengal* v. *Anwar Ali Sarkar,* A.I.R. 1952 S.C. 75, *Kathi Raning Rawat* v. *State of Saurashtra,* A.I.R. 1952 S.C. 123, *Lachmandas Kewalram* v. *State of Bombay,* A.I.R. 1952 S.C. 235, *Qasim Razvi* v. *State of Hyderabad.* A.I.R. 1953 S.C. 156 and *Habeeb Mohamed* v. *State of Hyderabad,* A.I.R. 1953 S.C. 287. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.'

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this court further established —

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.

(12) A close perusal of the decisions of this court in which the above principles have been enunciated and applied by this court will also show that a statute which may come up for consideration on a question of its validity under Article 14 of the Constitution may be placed in one or other of the following five classes:—

(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in *Chiranjitlal* v. *Union of India, supra, State of Bombay* v. *F.N. Balsara, supra, Kedar Nath Bajoria* v. *State of West Bengal*, A.I.R. 1953 S.C. 404, *V.M. Syed Mohammad & Company* v. *State of Andhra*, A.I.R. 1954 S.C. 314 and *Budhan Choudhry* v. *State of Bihar, supra.*

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum* v. *Mahboob Begum*, A.I.R. 1953 S.C. 91 and *Ramprasad Narain Sahi* v. *State of Bihar*, A.I.R. 1953 S.C. 215.

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal* v. *Anwar Ali Sarkar, supra, Dwarka Prasad* v. *State of Uttar Pradesh*, A.I.R. 1954 S.C. 224 and *Dhirendra Kumar Mandal* v. *Superintendent and Rembrancer of Legal Affairs*, A.I.R. 1954 S.C. 424.

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the court will uphold the law as constitutional, as it did in *Kathi Raning Rawat* v. *The State of Saurashtra, supra.*

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this court, e.g. in *Kathi Raning Rawat* v. *The State of Saurashtra, supra* that in such a case the executive action but not the statute should be condemned as unconstitutional."

As already stated, Mr. Chelliah submits that section 418A falls within statutes in class (iii) above, since it does not make any classification of the persons for the purposes of applying its provisions (on the contrary, it uses the words "any particular case") but leaves it to the discretion of the Public Prosecutor to select and classify persons to whom its provisions are to apply without laying down any principle or policy for the guidance of the exercise of the discretion by the Public Prosecutor in the matter of selection or classification and that therefore it violates Article 8; and he further submits that if there are two procedures available side by side, such as section 417 and section 418A, the one that is more drastic, namely under section 418A, is discriminatory and is on that ground also hit by Article 8; and he cites in support *The State of West Bengal* v. *Anwar Ali Sarkar*,[2] *Suraj Mall Mohta* v. *A.V. Visvanatha Sastri & Anor.*,[5] *Ram Dial* v. *State of Punjab*[3] and *Northern India Caterers (Private) Ltd.* v. *State of Punjab.*[4]

We shall now deal with some of the Indian decisions cited to us.

In *Anwar Ali Sarkar*[2] the respondent and 49 other persons were convicted by a Special Court established by section 3, West Bengal Special Courts Ordinance, 1949, subsequently replaced by the West Bengal Special Courts Act, 1950. The Act was entitled "an Act to provide for the speedier trial of certain offences" and the preamble declared that "it is expedient to provide for the speedier trial of certain offences." Section 3 empowered the State Govern-

ment to constitute special Courts and section 4 provided for the appointment of special judges to preside over such courts. Section 5, whose constitutionality was impugned, provided:

"5(1) A special court shall try such offences or classes of offences or cases or classes of cases, as the State Government may by general or special order in writing, direct."

A seven-judge court held by a majority of 6 to 1 that the Act laid down a procedure which was less advantageous to the accused than the ordinary procedure and that the Act was discriminatory, contrary to Article 14 and therefore void.

S.R. Das J. (as he then was) who agreed with the majority's conclusion, however, referred to the circumstances which may legitimately call for a speedier trial and swift retribution by way of punishment to check the commission of such offences, in these words:

"(63) On the other hand, it is easy to visualise a situation when certain offences, e.g., theft in a dwelling house, by reason of the frequency of their perpetration or other attending circumstances, may ultimately call for a speedier trial and swift retribution by way of punishment to check the commission of such offences. Are we not familiar with gruesome crimes of murder, arson, loot and rape committed on a large scale during communal riots in particular localities and are they not really different from a case of a stray murder, arson, loot or rape in another district which may not be affected by any communal upheaval? Do not the existence of the communal riot and the concomitant crimes committed on a large scale call for prompt and speedier trial in the very interest and safety of the community? May not political murders or crimes against the State or a class of the community, e.g. women, assume such proportions as would be sufficient to constitute them into a special class of offences requiring special treatment? Do not these special circumstances add a peculiar quality to these offences or classes of offences or classes of cases which distinguish them from stray cases of similar crimes and is it not reasonable and even necessary to arm the State with power to classify them into a separate group and deal with them promptly? I have no doubt in my mind that the surrounding circumstances and the special features I have mentioned above will furnish a very cogent and reasonable basis of classification, for it is obvious that they do clearly distinguish these offences from similar or even same species of offences committed elsewhere and under ordinary circumstances. This differentia quite clearly has a reasonable relation to the object sought to be achieved by the Act, namely, the speedier trial of certain offences. Such a classification will not be repugnant to the equal protection clause of our Constitution, for there will be no discrimination, for whoever may commit the specified offence in the specified area in the specified circumstances will be treated alike and sent up before a special court for trial under the special procedure. Persons thus sent up for trial by a special court cannot point their fingers to the other persons who may be charged before an ordinary court with similar or even same species of offences in a different place and in different circumstances and complain of unequal treatment for those other persons are of a different category and are not their equals."

He therefore held that:

"Section 5(1), in so far as it empowers the State Government to direct 'offences' or 'classes of offences' or 'classes of cases' to be tried by a special court, also, by necessary implication and intendment, empowers the State Government to classify the 'offences' or 'classes of offences' or 'classes of cases', that is to say, to make a proper classification, in the sense I have explained. In my judgment, this part of the section, properly construed and understood, does not confer an uncontrolled and unguided power on the State Government. On the contrary, this power is controlled by the necessity for making a proper classification which is guided by the preamble in the sense that the classification must have a rational relation to the object of the Act as recited in the Preamble. It is, therefore, not an arbitrary power."

We next turn to *Kathi Raning Rawat* v. *State of Saurashtra*.[8]

This case was decided by the same seven judges who decided *Anwar Ali Sarkar*.[2] They held that section 11 of the Saurashtra State Public Safety Measures Ordinance, which is an identical terms with section 5(1) West Bengal Special Courts Act which they held by a majority of 6 to 1 in *Anwar Ali Sarkar*[2] to be void because it conflicted Article 14, to be valid.

In *Anwar Ali Sarkar*[2] particular cases were referred to the Special Court. Here on the other hand offences of certain kinds committed in certain areas were referred to the Special Court. So there was classification. (The respondent was given an adjournment to file affidavits to explain the background to the ordinance). Also variations from the normal procedure authorised by the ordinance are less advantageous to the accused than under the West Bengal Act.

Sastri C.J. in *Kathi Raning Rawat* v. *State of Saurashtra*[8] said in his judgment on pages 125 and 126: —

"(7) All legislative differentiation is not necessarily discriminatory. In fact, the word 'discrimination' does not occur in Article 14. The expression 'discriminate against' is used in Article 15(1) and Article 16(2), and it means, according to the Oxford Dictionary, 'to make an adverse distinction with regard to; to distinguish unfavourably from others'. Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies. The power of the State to regulate criminal trials by constituting different courts with different procedures according to the needs of different parts of its territory is an essential part of its police power. Though the differing procedures might involve disparity in the treatment of the persons tried under them, such disparity is not by itself sufficient, in my opinion, to outweigh the presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands as, for instance, when it amounts to a denial of a fair and impartial trial. It is, therefore, not correct to say that Article 14 provides no further constitutional protection to personal liberty than what is afforded by Article 21. Notwithstanding that its wide general language is greatly qualified in its practical application by a due recognition of the State's necessarily wide powers of legislative classification, Article 14 remains an important bulwark against discriminatory procedural laws."

In *Jyoty Pershad* v. *Administrator for the Union Territory of Delhi*,[9] section 19 of the Slum Areas (Improvement and Clearance) Act, 1956, which provided that any decree obtained for the eviction of tenants of buildings in slum areas declared could not be executed without the permission of the "competent authority", was held not obnoxious to Article 14 as there was enough guidance to the competent authority in the use of his discretion under that section.

In considering the argument that the section was contrary to Article 14, the five-judge court made a summary of the principles previously followed by the court in interpreting Article 14, which summary on

slightly different lines was more relevant to the specific question before it. Ayyangar J., delivering the judgment of the court, said in para. (12) at page 1608: —

"(1) If the statute itself ... applies unequally to persons ... similarly situated, it would be an instance of a direct violation of the constitutional guarantee and the provision of the statute ... would have to be struck down.

(2) The enactment ... might not ... enact a discriminatory rule of law but might enable an unequal or discriminatory treatment to be accorded to persons ... similarly situated. ... In such circumstances the very provision of the law ... offends the guarantee of equal protection afforded by Article 14. ...

(3) It is manifest that the above rule would not apply to cases where the legislature lays down the policy and indicates the rule or the line of action which should serve as a guidance to the authority. ...

(4) It is *not*, however, essential for the legislation to comply with the rule as to equal protection, that the rules for the guidance of the designated authority, which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself. ...

Such guidance may thus be obtained from or afforded by —

(a) the preamble read in the light of the surrounding circumstances which necessitated the legislation, taken in conjunction with well-known facts of which the court might take judicial notice or of which it is appraised by evidence before it in the form of affidavits ...;

(b) or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the object sought to be achieved by the enactment."

Where two procedures are available.

We now turn to cases which decided that if two procedures are available, the one that is more harsh and prejudicial is discriminatory contrary to Article 14 and therefore void, cases on which Mr. Chelliah strongly relies.

The first in *Suraj Mall Mohta & Co.* v. *A.V. Visvanatha Sastri & Anor.*[5] There a person who evaded payment of income tax could be investigated under section 34 of the Income Tax Act, 1922, or under section 5(4) of the Taxation of the Income (Investigation Commission) Act, 1947.

The appellant was investigated under the 1947 Act. He claimed that the Act was void being inconsistent with Article 14.

The Supreme Court agreed with him.

Mahajan C.J. delivered the judgment of the court. This is what he said at pages 550 to 552: —

"It was not and could not be denied that the powers vested in the Commission [to investigate the appellant] and the procedure prescribed by the impugned Act are more comprehensive and drastic than those contained in the Indian Income-Tax Act. (Paragraph 7).

(10) Mr. P.R. Das for the petitioner attacked the provisions of section 5(1) of the Act on a two-fold ground: (1) That the section was not based on any valid classification; the word 'substantial' being vague and uncertain and having no fixed meaning, could furnish no basis for any classification at all; (2) That the Central Government was entitled by the provisions of the section to discriminate between one person and another in the same class and it was authorized to pick and choose the cases of persons who fell within the group of those who had substantially evaded taxation.

It could, if it chose, send the case of one person to the Commission and show favouritism to another person by not sending his case to the Commission though both of these persons be within the group of those who have evaded the payment of tax to a substantial extent.

(11) As regards sub-section (4) of section 5 the learned counsel contended that this section had no independent existence and was bound to fall within sub-section (1) of section 1, if his contention regarding the invalidity of that section prevailed. In the alternative, he contended that assuming that sub-section (1) was valid even then sub-section (4) had to be declared void because it gave arbitrary power to the Commission to pick and choose and secondly because the clause was highly discriminatory in character inasmuch as an evasion, whether substantial or insubstantial, came within its ambit as well as within the ambit of section 34 of the Indian Income-Tax Act.

(12) The learned Solicitor-General ... contended that the Act was based on a broad and rational classification, that it only dealt with a group of persons who had evaded income-tax 'from the beginning of the war, 1st January 1939' to the period ending with '1st September 1948' as a consequence of war controls resulting in black-marketing activities and huge profits. In other words, it was said that the Act only dealt with that group of persons who came within the class of war-profiteers. This was a class by itself and needed special treatment and therefore the law did not offend against the equal protection of the laws clause of the Constitution.

It was suggested that persons coming under sub-section (4) of section 5 also belonged to the same class and therefore on the same grounds that section also could not be declared void. It was further said that there was no substantial difference in the procedure prescribed under section 34 of the Indian Income-tax Act and the impugned Act and that in any case the procedure prescribed by the Act was a good substitute for that prescribed by the Indian Income-tax Act.

(15) [Sub-section (4)] obviously deals with the same class of persons who fall within the ambit of section 34 of the Indian Income-tax Act and are dealt with in sub-section (1) of that section and whose income can be caught by proceeding under that section. Assessees who have failed to disclose fully and truly all material facts necessary for the assessment under section 34 can be equated with persons who are discovered in the course of the investigation conducted under section 5(1) to have evaded payment of income-tax on their incomes.

The result is that some of these persons can be dealt with under the provisions of [the Taxation of the Income (Investigation Commission) Act, 1947], at the choice of the Commission, though they could also be proceeded with under the provisions of section 34 of the Indian Income-tax Act. It is not possible to hold that all such persons who evade payment of income-tax and do not truly disclose all particulars or material facts necessary for their assessment and against whom a report is made under sub-section (4) of section 5 of the impugned Act by themselves form a class distinct from those who evade payment of income-tax and come within the ambit of section 34 of the Indian Income-tax Act.

It is well settled that in its application to legal proceedings Article 14 assures to everyone the same rules of evidence and modes of procedure; in other words, the same rule must exist for all in similar circumstances. It is also well settled that this principle does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances, in the same position. The State can by classification determine who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject, but the classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis.

Classification means segregation in classes which have a systematic relation, usually found in common properties and characteristics. There is nothing uncommon either in properties or in characteristics between persons who are discovered as evaders of income-tax during an investigation conducted under section 5(1) and those who are discovered by the Income-tax Officer who have evaded payment of income-tax. Both these kinds of persons have common properties and have common characteristics and therefore require equal treatment. We thus hold that both section 34 of the Indian Income-tax Act and sub-section (4) of section 5 of the im-

pugned Act deal with all persons who have similar characteristics and similar properties, the common characteristics being that they are persons who have not truly disclosed their income and have evaded payment of taxation on income."

Our Solicitor-General, however, invited our attention to the last sub-paragraphs of paragraph 19 of the judgment at page 554 which read:

"There is no doubt that there is in this matter in the first stages some similarity in the procedure to be followed for catching evaded income both under section 34 of the Indian Income-tax Act and under the provisions of sub-section (4) of section 5 of the impugned Act; but the overall picture is that though under the Indian Income-tax Act the same officer who first arrives at a tentative conclusion hears and decides the case, his decision is not final but is subject to appeal, while under the provisions of sub-section (4) of section 5 the decision of the Commission tentatively arrived at in the absence of the assessee becomes final when taken in his presence, and that makes all the difference between the two procedures.

If there was a provision for reviewing the conclusions of the Investigation Commission when acting both as investigators and judges, there might not have been such substantial discrimination in the two procedures as would bring the case within Article 14; but as pointed out above, there is no provision of the kind in the impugned Act."

In *Ram Dial* v. *State of Punjab*,[3] decided 11 years later, three members of the Municipality Committee, Batala, were informed by the Governor of Punjab under section 14(e) of the Punjab and Municipalities Act, 1911, that the Governor for reasons of public interest had directed that their seats should be vacated from the date of the publication of a notification in the State Gazette. No notice was issued to them to show cause why their seats be not vacated and no hearing was given to them before the action in question was taken by Government.

Another provision, section 16, also gives power to the State Government to remove any member of the Municipality Committee but its proviso lays down that

"before the State Government notifies the removal of a member under this section the reasons for his proposed removal shall be communicated to the member concerned, and he shall be given an opportunity of tendering an explanation in writing."

A five-judge court unanimously held that section 14(3) is discriminatory contrary to Article 14 and therefore void. There were two provisions in the Act for removing a member. It depended entirely on the State Government to use its power either under section 14(a) or under section 16(1) where the two overlapped.

Two years later, came *Northern India Caterers (Pte) Ltd. & Anor.* v. *State of Punjab & Anor.*[4] There a five-judge court held by a majority of 3 to 2 that section 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 31 of 1959, was discriminatory and violative of Article 14. The objects and reasons given for the enactment of the Act were that there was no provision in any written law providing for summary removal of unauthorised occupants of Government property, that the only procedure available to Government was to sue the party concerned in a civil court, which was a cumbersome procedure involving delay, and that to keep all Government-owned lands free from encroachment, it was necessary to provide a speedy machinery. The preamble of the Act declared that the Act was passed to provide for eviction of unauthorised occupants from public premises. Section 4 provides that, if the collector is of the opinion that any person is in unauthorised occupation of public premises and that he should be evicted, he shall issue a notice in writing calling upon him to show cause why an order of eviction should not be passed. The notice must specify the grounds on which the order of eviction is proposed to be made and require such person to show cause not earlier than ten days from the date of issue. Section 5 provides that if, after considering the cause and evidence produced by such person and after giving him a reasonable opportunity of being heard, the collector is satisfied that the public premises are occupied without authority, he may make an order of eviction. Section 9 provides for an appeal against the order of the collector.

The objects and reasons of the Act and its preamble clearly indicate that the Act was passed to provide a speedier machinery than the ordinary civil suit for the purpose of evicting unauthorised occupants of public property.

The appellants were tenants of the Mount View Hotel at Chandigarh. The State Government of the Punjab took action against them under section 5. Shelat J., delivering the majority judgment, examined several previous decisions of the Supreme Court and said at page 1587:

"The principle which emerges from these decisions is that discrimination would result if there are two available procedures, one more drastic or prejudicial to the party concerned than the other and which can be applied at the arbitrary will of the authority."

He then went on to say on the same page:

"There can be no doubt that section 5 confers an additional remedy by way of suit and that by providing two alternative remedies to the Government and in leaving it to the unguided discretion of the Collector to resort to one or the other and to pick and choose some of those in occupation of public properties and premises for the application of the more drastic procedure under section 5, that section has lent itself open to the charge of discrimination and as being violative of Article 14. In this view, section 5 must be declared to be void."

There is, however, this observation in the minority judgment delivered by Bachawat J. He said in paragraph 24 at page 1589:

"(24) Without violating Article 14, the law may allow a litigant a free choice of remedies, proceedings and tribunals for the redress of his grievances. The plaintiff may have a choice of claiming specific relief or damages. As dominus litis, he has the option of suing in one of several courts having concurrent jurisdiction, and the defendant cannot insist that he must be sued at a place where he can more conveniently carry on the litigation. The plaintiff may even fix the original and appellate forums on the basis of his own arbitrary valuation. For a suit on a negotiable instrument, he may instead of choosing the ordinary procedure, adopt the summary procedure of Order XXXVII of the Code of Civil Procedure and shut out the defence altogether unless leave to defend is obtained. A landlord may evict a tenant by a suit or by a summary proceeding under Chapter VII of the Presidency Small Cause Courts Act. An aggrieved party may be free to choose one of several types of tribunals and modes of proceeding. He may obtain a rectification of the share register by a suit or by an application to the court taking company matters or by appealing to an administrative tribunal against the refusal of the company to register the transfer of shares."

In paragraphs 27 and 28 he went on as follows:

"(27) It is not pretended that the proceeding under the impugned Act is unfair or oppressive. The unauthorised

occupant has full opportunity of being heard and of producing his evidence before the Collector. He may obtain a review of the order of the Collector by an appeal to the Commissioner. He may in appropriate cases ask for a writ of certiorari from the High Court. He is not denied the equal protection of the laws because the Government has the option of proceeding against him either by a suit or under the Act. An unauthorised occupant has no constitutional right to dictate that the Government should have no choice of proceedings. The argument based upon the option of the Government to file a suit is unreal, because in practice the Government is not likely to institute a suit in a case where it can seek relief under the Act.

(28) Article 14 does not require a fanatical approach to the problem of equality before the law. It permits a free choice of remedies for the redress of grievances. The impugned Act makes no unjust discrimination. It promotes public welfare and is a beneficent measure of legislation. If we strike down the Act, we shall be giving a free charter to unauthorized occupants and to officers squatting on public premises after they have vacated their offices to continue in occupation for an indefinite time until they are evicted by dilatory procedure of a title suit. The Act does not suffer from any blemish and we uphold it."

Indeed the above minority view found favour seven years later with the Indian Supreme Court in *M. Chhagganlal* v. *Greater Bombay Municipality*,[10] a decision of a seven-judge court. Six of the judges came out quite emphatically with the view that *Northern India Caterers*[4] was wrongly decided, while the seventh judge thought that it was unnecessary to overrule the majority decision in that case, simply holding that the impugned procedure was not so onerous as to be discriminatory.

The issue was whether Chapter V-A of the Bombay Municipality Corporation Act and of the Bombay Government Premises (Eviction) Act, 1955 was violative of Article 14.

Chapter V-A of the Bombay Municipality Corporation Act was added to the Bombay Municipality Act, 1888, by Maharashtra Act 14 of 1961. Under sections 105A and 105B the Commissioner was granted certain powers to evict an unauthorised occupant of corporation premises. Under section 105B the Commissioner by notice can ask him to vacate in certain circumstances. Before making an order to vacate the Commissioner should issue a notice calling upon him to show cause why an order of eviction should not be made and specify the grounds on which the order is proposed to be made. The occupant can file a written statement and produce documents and is entitled to appear before the Commissioner by advocate. The Commissioner has, for the purpose of holding any enquiry, the same powers as a civil court. An appeal from his order lies to a judicial officer.

The provisions of the Bombay Government Premises (Eviction) Act at the material time are more or less similar.

There are thus two procedures available to the corporation and the State Government against unauthorised occupants of their property: (1) one by way of a suit under the ordinary law and (2) the other under either of the two Acts. It was said that the procedure under the Acts is harsher and more onerous than the procedure under the ordinary law. It was submitted that the procedure under the Act was hit by Article 14 in the absence of any guidelines as to which procedure may be adopted. For this reliance was wholly placed on *Northern India Caterers*.[4]

Alagiriswami J., delivered a judgment on behalf of three others and himself beginning at page 2012.

He reviewed previous Supreme Court decisions on Article 14. At page 2022 he said: —

"15. Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure, as in *Anwar Ali Sarkar's* case and *Suraj Mall Mohta's* case without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. Even there, as mentioned in *Suraj Mall Mohta's* case, a provision for appeal may cure the defect. Further, in such cases if from the preamble and surrounding circumstances, as well as the provisions of the statute themselves explained and amplified by affidavits, necessary guidelines could be inferred as in [*Kathi Raning Rawat*] and *Jyoti Pershad's* case the statute will not be hit by Article 14. Then again where the statute itself covers only a class of cases as in *Kangsari Haldar's* case A.I.R. (1960) S.C. 457 and [Kedar Nath] *Bajoria's* case (A.I.R. (1953) S.C. 404) the statute will not be bad. The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not affect the validity of the statute. Therefore, the contention that the mere availability of two procedures will vitiate one of them, that is the special procedure, is not supported by reason of authority.

16. The statute itself in the two classes of cases before us clearly lays down the purpose behind them, that is that premises belonging to the Corporation and the Government should be subject to speedy procedure in the matter of evicting unauthorized persons occupying them. This is a sufficient guidance for the authorities on whom the power has been conferred. With such an indication clearly given in the statutes one expects the officers concerned to avail themselves of the procedures prescribed by the Acts and not resort to the dilatory procedure of the ordinary Civil Court. Even normally one cannot imagine an officer having the choice of two procedures, one which enables him to get possession of the property quickly and the other which would be [a] prolonged one, to resort to the latter. Administrative officers, no less than the courts, do not function in a vacuum. It would be extremely unreal to hold that an administrative officer would in taking proceedings for eviction of unauthorised occupants of Government property or Municipal property resort to the procedure prescribed by the two Acts in one case and to the ordinary Civil Court in the other. The provisions of these two Acts cannot be struck down on the fanciful theory that power would be exercised in such an unrealistic fashion. In considering whether the officers would be discriminating between one set of persons and another, one has got to take into account normal human behaviour and not behaviour which is abnormal. It is not every fancied possibility of discrimination but the real risk of discrimination that we must take into account. This is not one of those cases where discrimination is writ large on the face of the statute. Discrimination may be possible but is very improbable. And if there is discrimination in actual practice this court is not powerless. Furthermore, the fact that the legislature considered that the ordinary procedure is insufficient or ineffective in evicting unauthorised occupants of Government and Corporation property and provided a special speedy procedure therefor is a clear guidance for the authorities charged with the duty of evicting unauthorised occupants. We, therefore, find ourselves unable to agree with the majority in the *Northern India Caterers'* case."

In paragraph 18 he, however, went on to say that in fact the procedure laid down by the two Acts was not so harsh or onerous as to suggest that it was discriminatory. "After all, Article 14 does not demand a fanatical approach."

Bhagwati J., speaking for himself and another judge, also held that the special procedure was not substantially more drastic and prejudicial (para. 14).

At page 2039 in paragraph 38 he said: —

"...We may point at the outset — and this must be constantly borne in mind, for otherwise it is likely to distort the proper perspective of Article 14 — that mere minor differences between the two procedures would not be enough to invoke the inhibition of the equality clause. The equality clause would become the delight of legal casuistry and be shorn of its real purpose which is to provide hope of equal dispensation to the common man — 'the butcher, the baker and the candlestick maker' — if we indulged in weaving gossamer webs out of this guarantee of equality or started [a] meticulous hunt for minor differences in procedure. What the equality clause is intended to strike at are real and substantial disparities, substantive or processual and arbitrary or capricious actions of the executive and it would be contrary to the object and intendment of the equality clause to exalt delicate distinctions, shades of harshness and theoretical possibilities of prejudice into legislative inequality or executive discrimination. Our approach to Article 14 must be informed by a sense of perspective and proportion based on robust understanding and rejection of ever-refined distinctions. The whole dimension of protection against discrimination in the processual sphere relates to real and substantial disparities in procedures. What is necessary to attract the inhibition of Article 14 is that there must be substantial and qualitative differences between the two procedures so that one is really and substantially more drastic and prejudicial than the other and not mere superfine differences which in this imperfect world of fallible human instruments are bound to exist when two procedures are prescribed. We should avoid [a] dogmatic and finical approach when handling life's flexible realities."

Khanna J. also agreed that the special procedure was constitutional, though, as already stated, he considered it unnecessary to overrule the majority decision in *Northern India Caterers.*[4] At page 2042 in paragraph 42 he said: —

"...I would, therefore, hold that the procedure envisaged in the impugned provisions is not onerous and drastic as would justify an inference of discrimination. The simple fact that there are two forums with different procedures would not justify the quashing of the impugned provisions as being violative of Article 14, especially when both procedures are fair and in consonance with the principles of natural justice. I agree with my learned brother Bhagwati J., that what is necessary to attract the inhibition of Article 14 is that there must be substantial and qualitative differences between the two procedures so that one is really and substantially more drastic and prejudicial than the other and that we should avoid [a] dogmatic and finical approach when dealing with life's manifold realities."

Principles deduced from Indian decisions

What are the principles relevant to the specific question before us that may be deduced from the Indian decisions? It is not easy to deduce them because, first, like Ong C.J. in *Karam Singh* v. *Menteri Hal Dalam Negeri, Malaysia,*[11] we find Indian judges, "for whom I have the highest respect, impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of ... powers." Secondly, because opinion among Indian judges is often as sharply divided as among counsel who appear before us, and sometimes the Indian Supreme Court retreats from a previously held position and favours views that were in a minority but a few years previously. This is not surprising because while we are all familiar with the idealistic concept of equality, Indian — and Malaysian judges — are not familiar with it as a legal concept, having been introduced in India only in 1949 and in Malaysia in 1957. As a legal concept it is easy to state, but difficult to apply — because, first, equality can only apply among equals and in real life there is little equality and, secondly, while the concept of equality is a fine and noble one it cannot be applied wholesale without regard to the realities of life. While idealists and democrats agree that there should not be one law for the rich and another for the poor nor one for the powerful and another for the weak and that on the contrary the law should be the same for everybody, in practice that is only a theory, for in real life it is generally accepted that the law should protect the poor against the rich and the weak against the strong. Thus few quarrel with the law prescribing different criteria of criminal and civil liability for infants as compared to adults, or with the law for the protection of women and children against men, for the protection of tenants against landlords and of borrowers against moneylenders, for the imposition of higher rates of quit rent on rubber estates compared to ricefields and on higher rates of income tax on millionaires compared to clerks. Study of A.I.R. shows that Indian judges have taken halting and hesitant and uncertain steps when determining whether a particular law violates the equality provision, sometimes giving reasons that are difficult to reconcile and sometimes retreating from a previously held position.

The sharp division of opinion among Indian judges will excuse our selecting only those principles with which we agree, irrespective of whether they are majority or minority opinions, certainly at this early stage of the development of this branch of the law, leaving the future to be determined and shaped in the light of particular cases that come up before us.

Doing the best we can, we are of the opinion that the principles relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:

1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.
3. The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words "public authority" in clause (4) and "practice" in clause (5)(b) of Article 8.
4. The prohibition applies to both substantive and procedural law.
5. Article 8 itself envisages that there may be lawful discrimination based on classification — thus Muslims as opposed to non-Muslims (para. (b) of clause (5) of Article 8); aborigines as opposed to others (para. (c)); residents in a particular State as opposed to residents elsewhere (para. (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153).
6. In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and

that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

7. In India discriminatory law is good law if it is based on "reasonable" or "permissible" classification, using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia*,[7] provided that

(i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above. We adhere to what was said in *Public Prosecutor* v. *Khong Teng Khen*[12] at page 170:

"The principle underlying Article 8 is that a law must operate alike on all persons *under like circumstances*, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons... for the purpose of legislation', *Kedar Nath* v. *State of West Bengal* (A.I.R. 1953 S.C. 404, 406).

In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on."

As regards the narrower question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification.

8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law. (Minority judgment in *N.I. Caterers*[4] and judgment in *M. Chhagganlal*[10]). We think that we should follow the same principle.

9. In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy. (*Per* Sastri C.J. in *Anwar Ali*[2]).

10. Mere minor differences between two procedures are not enough to invoke the inhibition of the equality clause (*per* Bhagwati J. in *Chhagganlal*[10]).

Section 418A is constitutional

In the light of the above principles, is section 418A discriminatory?

Consideration of this question does not require a fanatical approach, echoing the words in para. 28 in *N.I. Caterers*[4] of Bachawat J. who was then in the minority with Hidayatullah J. Echoing the words of Bhagwati J. 11 years later in *M. Chhagganlal*,[10] Article 8 would become the delight of legal casuistry and be shorn of its real purpose if we indulged in weaving gossamer webs and started a meticulous hunt for minor differences in procedure, and our approach to it must be informed by a sense of perspective and proportion, avoiding a dogmatic and finical approach.

Approaching the question in this way we have come to the following conclusion.

First, we do not think that section 418A is discriminatory. Though it uses the words "any particular case", it does not apply specifically to the particular case against the accused. Indeed, on the authority of *Charanjit Lal Chowdhury* v. *The Union of India*,[13] even if the section were directed at the particular case against the accused it could under certain circumstances be held to be nevertheless constitutional. In our view, agreeing with Ajaib Singh J. in *Public Prosecutor* v. *Oh Kheng Seng*,[14] the section applies to *all* criminal cases triable in a subordinate court.

It is true, as Mr. Chelliah submits, that if the Public Prosecutor had applied for the case against the accused to be transferred under section 417, the accused would have enjoyed the advantage of objecting to the application, the advantage of a preliminary enquiry if the High Court had made an order not under paragraph (cc) but under paragraph (dd) of sub-section (1), the chance of being discharged at the end of the preliminary enquiry and the advantage of having depositions to help him with the preparation of his defence if committed for trial before the High Court. But in our view a preliminary enquiry is not a fundamental right guaranteed by the constitution; if the accused had been tried in the Sessions Court he would not have had the use of depositions before the trial; and at the trial in the High Court he also enjoyed the chance of not being called upon for his defence at the close of the case for the prosecution. Also, by being tried in the High Court he did not run the risk of greater penalty, for if he had been tried in the Sessions Court, he would have been liable to the full penalty prescribed by law, section 28 of the Prevention of Corruption Act. In any event, the trial in the High Court followed the same rules of procedure and evidence as would have been followed in the Sessions Court and so there is no question of the accused being denied a fair and impartial trial. As stated by Sastri C.J. in *Anwar Ali Sarkar*[2] in paragraph 7, there is a presumption that the law is constitutional, since the legislature must of necessity have power to make laws operating differently, and though differing procedures might involve disparity in the treatment of persons under them, such disparity is not by itself sufficient to outwit the presumption and establish discrimination unless the degree of disparity amounts to a denial of a fair and impartial trial. Finally, whether tried in the Sessions Court or High Court, the accused has a right of appeal which indeed he has exercised, and, as was stated in paragraph 19 of the judgment in *Suraj Mall Mohta*[5] and in *M. Chhagganlal*,[10] a provision for appeal may cure any defect in the law.

Secondly, if the law may be regarded, contrary to our opinion, as discriminatory, we are of the opinion that there is reasonable classification in it, there is a nexus between it and the object of the law, and there is a principle or policy in it to guide the Attorney-General in the exercise of his discretion under section 418A.

As regards classification, the Code quite reasonably classifies cases into those triable in a magistrate's court, in a Sessions Court and in the High Court, putting the least serious cases in the first class, the most serious in the third and those in between in the second. In our view this classification is made in the interest of the efficient administration of justice. This classification in our view also affords the necessary guideline to the Attorney-General when acting under section 418A who will be expected to transfer to the High Court only cases of unusual difficulty or of unusual importance, and there is no doubt that the case against the accused is one of great difficulty, considering that the trial took nine days and the appeal alone 13 days, the longest time taken to argue an appeal in Malaysia. Nor also is there any doubt as to the importance of this case, in view of the position occupied by the accused in public life and the great interest shown by his supporters who crowded the public gallery during the trial and part of the appeal and the extraordinary precautions taken by the Police to ensure the security of the court during the whole of the trial and the first two or three days of the appeal. In view of all this, delay of the trial was undesirable. However, we are aware of this only after the trial had begun. The Attorney-General, however, even before the trial had sources of information and he had information not available to the court and if armed with this information he decided to act under section 418A the court should not on that account alone, strike down the section. We agree with Hashim Yeop A. Sani J. who said at page 132 in *Public Prosecutor* v. *Su Liang Yu*[15] that section 417 and section 418A are vehicles for the Attorney-General to exercise his power under Article 145(3); and it is for him to judge which case is difficult or important enough to be given an early trial after a transfer to the High Court under section 418A.

We also find authority for our view from three cases.

In the first case, *Budhan Choudhry & Ors.* v. *State of Bihar*,[6] section 30 of the Criminal Procedure Code provides:

"In Assam [etc.] the State Government may, notwithstanding anything contained in section 28 or section 29, invest the District Magistrate or any Magistrate of the first class, with power to try as a Magistrate all offences not punishable with death." and

section 28 provides:

"28. Subject to the other provisions of this Code, any offence under the Indian Penal Code may be tried:

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other court by which such offence is shown in the eighth column of the Second schedule to be triable."

The appellants were convicted by a Magistrate exercising powers under section 30.

They contended that section 30 was *ultra vires* Article 14. They said that they should have been tried before a session judge. The substance of their grievances is that a trial before a sessions judge is much more advantageous to an accused person in that he gets the benefit of commitment proceedings before a Magistrate and then a trial before the sessions judge with the aid of a jury or assessors.

It was held by a court of seven judges that section 30 was not *ultra vires*. The risk of being tried under a section 30 Magistrate falls alike upon all persons committing offences not punishable with death. There is an obvious classification in the Criminal Procedure Code and there is no discrimination.

The second case is *Macherla Hanumantha Rao & Ors.* v. *The State of Andhra Pradesh*,[16] where sections 207 and 207A, Criminal Procedure Code, were held not discriminatory within Article 14.

A Magistrate, following the procedure in section 207A of the Criminal Procedure Code, committed the appellants to the Court of Session. It was argued that the procedure under that section is less advantageous to the accused than the procedure he could have followed under section 207.

Held there was classification in the Criminal Procedure Code. The object of the new section 207A is to simplify and expedite the procedure relating to trial of offences and to enquiries preceding such trials.

Sinha J. delivering the judgment of the court said in para. (8) at page 931:

"... is it always to the advantage of an accused person that there should be an elaborate procedure before such a Magistrate and not a summary one? It is the avowed policy of the Legislature and there can be no doubt that it is in the general interest of the administration of justice, that crimes should be investigated and criminals brought to justice as expeditiously as circumstances of the case would permit. That must also be in the interest of an accused person himself if he claims not to be guilty of an offence.

Generally speaking ... only a real offender would be interested in prolonging the inquiry or trial so as to postpone the day of judgment. If a person has been falsely or wrongly accused of an offence, it is in his interest that he should get himself declared innocent by a competent court as early as possible."

In the instant case too it is obvious that the scheme of the amendments to sections 138, 417 and 418A is to expedite trials, and as in our view there is an obvious classification, a classification clearly connected with the underlining principle of administration of justice that an alleged criminal should be placed on trial as soon after the commission of the crime as circumstances of the case would permit, and this classification cannot be regarded as unreasonable and not having a nexus with the object of the amendments, namely speedy trial.

In para. 4 at page 929 Sinha J. said:

"It is true that for the first time, the impugned sections have prescribed two different procedures in respect of commitment proceedings as already indicated, but we have to remember that there is absolutely no difference in the *procedure at the trial* in contra-distinction to the procedure relating to the enquiry leading up to commitment of an accused person to a Court of Sessions or a High Court in cases triable exclusively by such a court."

In the instant case also, as already stated, there is absolutely no difference in the procedure at the trial.

We would like next to refer to *Matajog Dobey* v. *H.C. Bhari.*[17] There section 197 of the Criminal Procedure Code requires a sanction to the prosecution of public officers on certain charges. Held unanimously by a five-judge court, that giving power to sanction or not under section 197 was not inconsistent with Article 14. It is argued that giving the Public Prosecutor in the instant case discretionary power to choose to act either under section 417 or 418A is discriminatory, but, as was stated at page 48 by Chandrasekhara Aiyar J. when delivering the judgment of the court in *Matajog Dobey* v. *H.C. Bhari,*[17]

"It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official."

Here too there is no question that the Public Prosecutor is not a minor official. This court has already dealt with the power of the Attorney-General in his capacity as Public Prosecutor at great length in *Long bin Samat & Ors.* v. *Public Prosecutor,*[18] in *Public Prosecutor* v. *Khong Teng Khen & Ors.,*[12] and recently in *Johnson Tan Han Seng* v. *Public Prosecutor* and three related appeals,[19] and here we do not wish to add anything except to remind ourselves of the words of Lord Denning M.R. used in another context in *A.G. ex rel. McWhirter* v. *I.B.A.,*[20] which we think apply also in relation to his powers in regard to criminal prosecutions generally. This is what he said:

"It is well settled that in our constitution in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from whatever quarter it may come. As guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law."

In the instant case, it is only the possibility of discrimination, not actual discrimination, that is complained of. However, there is no doubt, as was stated by the principal judgment of the Indian Supreme Court in *Chhaganlal,*[10] that if there has been actual discrimination by the Attorney-General this court will not be powerless to act.

We are therefore of the opinion that section 418A is constitutional.

SECOND PART

We now come to the second part of the appeal in which it is argued that the conviction cannot be supported by such evidence as was admissible.

In this part we shall deal first with parts of the evidence which it is said should not have been admitted.

Inadmissibility of some evidence?
Exhibit P10

It is submitted on behalf of the accused that exhibit P10, admitted by the judge for the reason given by him in (1977) 1 M.L.J. 14, should not have been admitted and that its admission has prejudiced the defence.

This was a statement recorded from the accused by Mr. S. Sebastian, Head of Special Investigation Section, National Bureau of Investigations, who has the same power as a police officer, section 5, Biro Siasatan Negara Act, 1973.

Previously Mr. Sebastian had made many attempts to record a statement from the accused, but in vain. In court the accused explained (a) that he was not unwilling to give a statement, but he had been told that NBI officers wanted to spend with him three to four days at a stretch; and (b) that he was unable to give them that much time at short notice, as he had appointments up to 6 weeks ahead, including Saturdays and Sundays. Eventually Mr. Sebastian served on him an order under section 111 of the Criminal Procedure Code and on Saturday, 22nd November, 1975, recorded the statement (exhibit P10).

Section 111 reads as follows: —

"111. (i) A police officer making an investigation under this Chapter may by order in writing require the attendance before himself of any person being within the limits of the police district in which he is making an investigation who from the information given or otherwise appears to be acquainted with the circumstances of the case, and such person shall attend as so required...

(ii) If any such person refuses to attend as so required such police officer may report such refusal to a Magistrate who may thereupon in his discretion issue a warrant to secure the attendance of such person as required by such order aforesaid.

(iii) ...."

The statement was recorded not at the NBI office, but at the accused's own office in the Secretariat Building. At 9.55 a.m. Mr. Sebastian saw the accused, who gave him up to 12.45 p.m. to complete what he had to do. When he arrived, the accused was with Mr. Chelliah, his solicitor, who was later his counsel. Before the statement was recorded, Mr. Chelliah sent for his assistant Mr. P. Vijendran and subsequently his junior at the trial and during the appeal. When Mr. Vijendran arrived, Mr. Chelliah withdrew so that he could later represent the accused in court, leaving Mr. Vijendran with the accused, and Mr. Sebastian began, as required by law, by informing the accused of the provisions of subsections (ii) and (iii) of section 112 of the Criminal Procedure Code, which then provided and still does: —

"112. (i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case but to him by such officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under subsection (i) shall first inform that person of the provisions of subsections (ii) and (iii)."

It is to be observed that under section 113 as it existed then, the statement made by the accused would not have been admissible, since, as already stated, Mr. Sebastian has the same power as a police officer and the statement was made by the accused in the course of a police investigation.

Subsequently, however, section 113 was amended by Act A324 with effect from 10th January, 1976, to render that statement admissible in certain circumstances. It now reads as follows: —

"113. (1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that —

(a) no such statement shall be admissible or used as aforesaid —

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him."

It is to be observed that when the statement was recorded the accused had not then been arrested (he was arrested two days later), and therefore only paragraph (i), not paragraph (ii), of proviso (a) to subsection (1) of the amended section 113 applies.

It is also to be observed that the then section 15 of the Prevention of Corruption Act, 1961, already contained (and still contains) a provision substantially similar to the new section 113 of the Criminal Procedure Code. That section 15 reads as follows: —

"15. (1) In any trial or inquiry by a court into an offence under this Act, or into a prescribed offence, any statement by an accused person, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by the person to or in the hearing of any police officer, whether or not interpreted to him by any other police officer or any other person concerned, or not, in the arrest, shall, notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if the person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that no such statement shall be admissible or used as aforesaid —

(a) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against that person, proceeding from a person in authority and sufficient in the opinion of the court to give that person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by that person after his arrest, unless the court is satisfied that, before making the statement, a caution was administered to him in the following words or words to the like effect:

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of any offence referred to in subsection (1) shall not be bound to answer any questions relating to the offence after any such caution as aforesaid has been administered to him."

At this stage it is convenient to reproduce section 24 of the Evidence Act:

"24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement,

threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him."

Mr. Chelliah's argument objecting to the admission of the statement runs on this line. The statement was not a free and voluntary one. The moment section 112 was brought to the accused's attention he was put in fear, the fear being that if he did not answer truthfully Mr. Sebastian's questions he might be contravening the law and possibly be subject to prosecution for not complying with the law; in that frame of mind he felt he had no choice but to comply with Mr. Sebastian's request, and the fact that the accused is a lawyer and is aware of the law fortified his fear.

We have studied the four cases cited by Mr. Chelliah, *Chye Ah San* v. *Regina*,[21] *Heah Chin Kim* v. *Public Prosecutor*,[22] *Yii Kim Hai* v. *Regina*[23] and *Public Prosecutor* v. *Law Say Seck*,[24] and we are of the opinion that the trial judge was right to admit the statement.

Even ignoring the amendment to section 113, clearly section 15 of the Prevention of Corruption Act applies. Subsection (1) states the general rule that the statement is admissible. Proviso (a) thereto as well as section 24 of the Evidence Act, however, provide that it shall not be admissible if the making of the statement appears to have been caused by any inducement, threat or promise. Thus the question is, was the statement a free and voluntary one? It was given by the accused not at the police station, it was given in his own office at a time convenient to him and in the presence of his solicitor and two days before his arrest. In evidence the accused admitted that no threat or inducement was made or offered to him (page 29 A3), though he also said that he gave the statement voluntarily, knowing that it would not be used against him. Mr. Vijendran also said in evidence that the statement was voluntarily made, though he told the accused that it would not have been admissible against him under section 113.

As regards *Chye Ah San*[21] the appellant there, who was charged with an excise offence, made three statements.

The first was made at the house where he was first interviewed by Customs to whom he opened the front door. This statement was held to be admissible.

The second statement was made at the Customs Office when the appellant was in custody. This was held to be inadmissible because there was some doubt about its being a free and voluntary one.

The third statement was made to a Senior Customs Officer some four hours after the last two statements. This statement was held inadmissible because before recording the statement the Senior Customs Officer brought to the attention of the appellant the provision of section 51 of the Excise Enactment which reads:

"Every person required by a Senior Excise Officer to give any information on any subject which it is such officer's duty to enquire into under this Enactment and which information it is in his power to give shall be legally bound to give such information."

Spenser Wilkinson J. held that bringing the above provision to the notice of the appellant constituted a threat and therefore the statement given by him was not a free and voluntary one. But it is to be noted that that statement was given by the appellant at the Customs Office and while he was in custody, and also under section 51 of the Excise Enactment a person is bound to answer all questions including those that incriminate him, which is not the case under section 112 of the Criminal Procedure Code.

The full judgment in *Heah Chin Kim*[22] is not available and it is impossible for us to determine its *ratio decidendi*.

In *Yii Kim Hai* v. *Regina*,[23] a decision of the Court of Appeal, Borneo, on sections 115, 116 and 117 of the old Sarawak Criminal Procedure Code to the effect that if an accused was asked questions his statement was not admissible, notwithstanding subsection (5) of section 117, it would appear that the court's attention was not brought to section 29 of the Sarawak Evidence Ordinance which (*in pari materia* with section 29 of our own Evidence Act) read as follows:

"29. If such a confession is otherwise relevant, it does not become irrelevant merely ... *because it was made in answer to questions which* he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him."

Section 29 was also overlooked by the Singapore Court of Appeal in *Rex* v. *Lim Ah Seng*,[25] as was pointed out by the same court two years later in *Rex* v. *Santokh Singh*.[26]

A suspect questioned by the N.B.I. is obliged to answer all questions except incriminating ones, and his statement may be used in evidence against him, as follows:

(1) in the case of a statement recorded before arrest, if it was made voluntarily, proviso (a) to subsection (1) of section 15 of the Prevention of Corruption Act; and

(2) in the case of a statement made after arrest, if he had been warned before he made the statement, proviso (b), and if the statement was made voluntarily, section 24, Evidence Act.

Isn't there a conflict between section 112(ii) which says that the suspect is compelled to answer all questions except incriminating ones and section 15 which says that a statement made before arrest is admissible if made voluntarily? We would say not, because subsection (1) clearly says that if the conditions set out therein are fulfilled, the statement is admissible "whether or not wholly or partly in answer to questions" and because of section 29 of the Evidence Act which clearly provides that if a confession is otherwise admissible, *i.e.* because the court is satisfied that it was made voluntarily, it does not become inadmissible simply because it was "made in answer to questions which he need not have answered, whatever may have been the form of those questions." See *State of Bombay* v. *Kathi Kalu*.[27]

This should not, however, be taken as an open invitation to the authorities to apply pressure to extort confessions from suspects as from the words "appears to the Court" in proviso (a) to subsection (1) of section 15 of the Act and in section 24 of the Evidence Act, it is quite clear that before admitting a statement the court will require sufficient proof that it was made voluntarily.

Exhibit P23

It is submitted on behalf of the accused before us (but not before the trial judge) that the judge should not have admitted exhibit P23, a letter written by Mr. Peter Lim on 9th July, 1975, to an officer of the bank. That letter reads as follows:

"9th July, 1975.

Mr. D.A. McKnight,
The Hongkong & Shanghai Banking Corporation,
19/21, Leboh Pasar Besar,
KUALA LUMPUR.

Dear Sir,

Re: *THE HONGKONG BANK BUILDING IN KUALA LUMPUR*

We have been asked by the National Bureau of Investigations to submit a report regarding the Hongkong Bank's payment to the UMNO Party Political Fund. Our Mr. Peter Lim would be making the following statement if we do not receive any comments from you by 12 noon on 14th July 1975:—

1. Mr. Peter Lim accompanied Mr. Smorthwaite of the Hongkong & Shanghai Banking Corporation to the offices of Datuk Harun to seek permission to obtain a lease over state land in conjunction with the proposed new Hongkong Bank H.Q. in Kuala Lumpur.
2. Datuk Harun asked for contribution of $250,000 to the UMNO Party Political Fund and the Bank agreed to this contribution. Mr. Peter Lim was asked by a representative from Datuk Harun to deliver the first payment of $25,000 at the airport and he did so. A temporary receipt was issued to Mr. Peter Lim at the airport and this was sent to the Bank. A permanent receipt was issued in the name of Mr. Peter Lim and this was also sent to the Bank for safe keeping. The Bank then arranged for the remainder of the money to be deposited in a personal box so that Datuk Harun and/or his representatives could call at any time during business hours to collect this money.
3. Mr. Peter Lim was asked to be present at the Bank and he was present when several representatives from Datuk Harun collected from the Bank Box the remainder of the money. A representative signed the Bank Book in the bank when they collected this amount but no further receipt was received by Mr. Peter Lim for the remainder of the money.

Yours faithfully,
Sd. [Mr. Peter Lim]"

It will be observed that Mr. Lim had been asked by NBI to submit a report in July 1975, regarding payment of $250,000 to the accused in 1972 and 1973, some two or three years earlier, and in that letter Mr. Lim told the bank the kind of things he would tell NBI. This letter, recovered by NBI during the course of their investigation, was shown to Mr. Lim by the prosecution while he was giving evidence in chief, not, it is submitted on behalf of the prosecution before us, to corroborate his evidence, under section 157 of the Evidence Act, nor to refresh his memory under section 159, but simply to show consistency of his conduct. We have considered this matter and we are of the opinion that, while agreeing with Mr. Chelliah it could not have been used under sections 157 and 159, it could, agreeing with Encik Talib before us, have been used to prove consistency of conduct on the part of Mr. Lim as to what he proposed to do and say soon after he had been interviewed by NBI. In any event, the trial judge could not have been influenced by it, as he made no reference to it in his judgment, and we are accordingly of the opinion that there is no merit in this ground.

Exhibits P44 to P47

It is submitted on behalf of the accused that during the cross-examination of the accused the judge wrongly permitted questions relating to the use made by the accused of UMNO funds and the introduction of exhibits P44 to P47 and that in his judgment he wrongly directed himself on the basis of the evidence so admitted.

These exhibits are cheques drawn on the Mercantile Bank by the accused, payable out of UMNO Special Fund account which the accused operated. The first cheque was dated 10th November, 1972, for $2,500; the second 5th June, 1973, for $25,000; the third 18th June, 1973, for $10,000 and the fourth 5th July, 1971, for $30,000.

The accused admitted that the first cheque was to pay for the swimming pool in his own house and that the second was paid into his own personal account, but explained that sometimes money was paid for party purposes out of his personal account, to be recouped later out of UMNO money. Mr. Chelliah's complaint is that these cheques were irrelevant to the charges actually before the court, that they relate to other charges pending against the accused and that therefore they should not have been admitted, since they tended to show that he had committed these other offences, and in support he cites subsection (2) of section 54 of the Evidence Act which reads:

"(2) A person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed ... or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless —

(a) the proof that he has committed ... such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;

(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(c) he has given evidence against any other person charged with the same offence."

Mr. Chelliah also cites in support two English decisions on the corresponding provision in England: *Rex* v. *Ellis*[28] and *R.* v. *Cohen.*[29]

On behalf of the prosecution it is submitted before us that the accused himself had during the course of cross-examination of some prosecution witnesses, namely Ahmad Razali and Rosedin, (and also during the course of his evidence-in-chief) introduced evidence of the existence of the UMNO Special Fund which he had power to operate, that these cheques were introduced not to supplement the case for the prosecution, but simply to discredit the evidence for the defence, and that in any event there was no prejudice in their admission as the accused himself had admitted that occasionally he paid UMNO money into his personal account.

With respect we agree with Mr. Chelliah that certainly evidence relating to the first two cheques should have been excluded under subsection (2) of section 54.

We also agree with Mr. Chelliah that the judge wrongly directed himself on the basis of these two cheques, for he said in his judgment at page 276 of the appeal record that the accused's credibility, because of these two payments to himself, if nothing else, was discredited, and that he thought that the circumstances established by the evidence were sufficient to warrant the reasonable inference that he pocketed party funds.

The question then arises whether, in the words of section 167 of the Evidence Act, independently of the evidence objected to and admitted, there was sufficient evidence to justify the judge's decision. We shall deal with this in the proper place.

System and exhibits P48 to P51

It is submitted on behalf of the accused that during the cross-examination of the accused the judge wrongly permitted questions relating to what was said to be "system" and the introduction of exhibits P48 to P51 and that in his judgment he wrongly directed himself on the basis of the evidence so admitted.

Exhibit P48 is an agreement dated 28th September, 1971, relating to some mining activities between Kampong Lanjut Tin Dredging Ltd., Malayan Commercial Services Sdn. Berhad and the late Mr. Lim Chooi Seng, page 372 of the appeal record.

Exhibit P49 is a letter dated 6th July, 1971, from Suny Sendirian Berhad and witnessed by Ng Aik Swee, Treasurer of the Selangor Alliance, addressed to the accused on behalf of the Selangor Alliance," promising to pay the accused 10% tribute on all tin ore produced from a piece of land belonging to the Malayan Leprosy Relief Association if Suny Sendirian Bhd. obtained a sublease of the land and approval was given to mine the land, page 379 of the appeal record.

Exhibit P50 is a receipt dated 12th August, 1972, signed by the accused and Encik Ahmad Razali acknowledging receipt of $500,000 from the late Mr. Lim Chooi Seng. It was an official receipt given on behalf of UMNO, page 380 of the appeal record.

Exhibit P51 at page 380 of the appeal record is a note on the accused's official letterhead and is in the following terms: —

"*Sai Wai Realty* (Y.B. Razali)

$75,000 to be paid monthly

1st payment	—	$5,000	6/7/71
2nd payment	—	$5,000	9/8/71
3rd payment	—	$5,000	7/2/72
6th payment	—	$5,000	12/2/72."

The judge rejected P48 and P49, but admitted P50 and P51.

The accused explained in evidence that the donation of $500,000 to UMNO by Mr. Lim Chooi Seng was a voluntary and honest one, and the judge's comment (page 276) was that if the accused and Encik Ahmad Razali could have given Mr. Lim Chooi Seng an official receipt, his omission to give the bank a receipt for $225,000 (part of their donation) showed that that donation was not a voluntary and honest one, unconnected with their land applications.

As regards exhibit P51, that was a kind of statement of accounts kept by the accused showing four payments made presumably by Sai Wai Realty to the accused through Encik Ahmad Razali, and the judge's comment (page 275) is that since the accused kept that statement of account, a bare statement by the accused that he kept no account at all of the UMNO Special Fund under his control was not a plausible suggestion.

Mr. Chelliah's complaint before us is that the judge should not have used P50 and P51 to discredit the accused, since the accused never denied receiving donations, that on the contrary it was the accused's case that he on UMNO's behalf received donations, that UMNO could not exist on members' subscriptions alone (25 cents per head per year), and that in fact UMNO lived on donations.

As regards "system", these two documents if relevant would be relevant under section 15 of the Evidence Act which reads:

"15. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

Mr. Chelliah relies on *Noor Mohamed* v. *The King*[30] and cites the headnote and a passage beginning with the 12th line on page 190 and ending at the end of the next following paragraph. In brief he says that the prosecution cannot adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the charges, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is charged, that the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the court, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged are designed or accidental, or to rebut a defence which would otherwise have been open to the accused; but, and this is the important part of Mr. Chelliah's submission, before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant, and that the mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose, and that the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice.

In our judgment P50 was rightly admitted, since it was not evidence tending to show that the accused has been guilty of an offence other than the offences with which he was charged. This exhibit merely went to show that a voluntary and honest donation was

usually followed by the issue of an official receipt, and so could legitimately be used to rebut a defence which was open to the accused and which had been raised by him in substance.

P51 also was not evidence admitted to show that the accused was guilty of an offence other than the offences with which he was charged, but was relied on by the judge as showing that in the case that accused did maintain some sort of accounts.

We therefore do not think that there is merit in this ground of appeal.

Is conviction supported by such evidence as was admissible?

We now turn to the other arguments for saying that the conviction cannot be supported by such evidence as was admissible.

Briefly the case for the prosecution is this. The Hongkong & Shanghai Bank own lots 76, 77 and 78 in section 11, Bandaraya Kuala Lumpur, and a narrow strip of land held on T.O.L. 6450 since 1963, measuring 450 sq. ft. sandwiched between lots 76 and 77. They wanted to pull down the buildings on the three lots and build on them and on the narrow strip a 28-storey block with a cantilevered podium extending over Benteng and an underground car park, costing in the region of $27m. To succeed they needed title to the T.O.L. land and then amalgamate the land with the other three lots; and also a right to the airspace over Benteng so that they could build a projection over the road. Bandaraya had no objection if the State Government which had control over land had no objection. The accused was Mentri Besar of the State. He was also President of UMNO Youth and ex-officio Vice-President of UMNO and Chief of the UMNO and of the Alliance (subsequently National Front) in Selangor.

It was alleged, and the judge found proved, that the accused corruptly solicited $250,000 for his political party UMNO from the bank as an inducement for him to obtain approval of the bank's application for the strip. That was the subject of the first charge.

It was alleged, and the judge found proved, that subsequently the accused accepted from the bank the above sum in two instalments:

"(a) as to $25,000 on 16th August, 1972, at the Subang international airport prior to the departure of the accused for the Munich Olympics. (This was the subject of the second charge); and

(b) as to the remaining $225,000 on or about 27th March, 1973, at his office. (This was the subject of the third charge)."

The accused admits accepting the above two sums, but contends that they were donations voluntarily made by the bank, that he did not solicit them, that they had nothing to do with the bank's application, and that he accepted them honestly.

It is no offence for a Mentri Besar to solicit or accept a donation for his political party honestly, *i.e.* unconnected with affairs of state.

Thus the issues here were, as regards the first charge, did the accused solicit the $250,000 corruptly from the bank as an inducement for him to approve the bank's application, and, as regards the second and third charges, did he accept the two sums also corruptly, though the word "corruptly" is not used in section 9(b) of the Prevention of Corruption Act.

Did the accused solicit the $250,000 from the bank?

The only evidence on this comes from Mr. D.J.R. Smorthwaite, the then manager of the bank, Mr. Peter Lim, the bank's then architect, Encik Rosedin, the accused's political secretary, and Mr. J.G.T. Sim, the bank's then deputy manager — all of whom are accomplices, according to Mr. Chelliah.

The prosecution concedes before us that Smorthwaite, Lim and Rosedin were accomplices but not Sim.

The first point taken by Mr. Chelliah as to this is that the judge did not consider the question whether or not they were accomplices or persons whose evidence should be corroborated.

It is true that the judge nowhere stated in explicit terms that he was aware of the danger of convicting on the uncorroborated evidence of an accomplice and that the corroboration required must be independent testimony which confirms in some material particular not only the evidence that the crime has been committed, but also that the accused committed it (*The King* v. *Baskerville*[31] and *Chiu Nang Hong* v. *Public Prosecutor*).[32]

But we are of the opinion from the following passages in his judgment that he did consider the question whether Smorthwaite, Lim, Rosedin and Sim were persons whose evidence required corroboration.

At page 222 the judge said: —

"It is in this light that the evidence of the prosecution witnesses, in particular that of Peter Lim, Rosedin, Chew Beng Chiat and the bank officials, must be considered. Their testimony is not to be rejected in toto without adequate justification, without meticulous scrutiny. The further circumstances that they are interested witnesses assumes a greater significance and it may not be prudent to base a conviction on their sole evidence without corroboration.

... It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime."

When discussing the evidence relating to the acceptance by the accused of $225,000, the judge said (page 248):

"... it is enough if there is independent evidence of relevant circumstances connecting the accused with the receipt of the $225,000. The evidence need not be direct, it is sufficient if it is merely circumstantial evidence of the accused's connection with the crime."

On page 250 again he says:

"These are damning circumstantial evidence that connected the accused with acceptance of the $225,000."

As was stated by Lord Donovan at page 43 in *Chiu Nang Hong* v. *Public Prosecutor*:[32]

"No particular form of words is necessary for this purpose [i.e. of the judge making it clear that he has the risk of convicting on the uncorroborated evidence of an accomplice, in his mind]: what is necessary is that the judge's mind upon the matter should be clearly revealed."

What is the evidence of the soliciting alleged in the first charge?

Smorthwaite, the then manager of the bank, said that by the end of 1971, that is after a period of approximately 6 months, the bank had still not received approval to proceed with their project. He asked Lim to arrange a meeting with the accused. A meeting was held with the accused on 22nd February, 1972, in his office at which were present Smorthwaite, Lim with a model of the proposed building, and Ishak, the quantity surveyor's representative. The accused was briefed on the bank's project. The accused referred to the problem of relocating hawkers for the night market at Benteng, the problem of car park space and the problem arising out of title to the airspace. Smorthwaite got the impression that the accused was quite in favour of the new building. The meeting lasted about half an hour. After the meeting Smorthwaite reported by letter to head office in Hongkong.

It is to be noted that to succeed the bank required not only the T.O.L. land but also part of Benteng which was state land over which the projection was to be built.

On 24th April, 1972, Smorthwaite wrote another letter, exhibit P14 (page 306), to head office in Hongkong in which he, without mentioning figures, for the first time referred to the State Government's ideas on a donation which he described as "extra development charge." The first two paragraphs of that letter read:

"*BANK PROPERTY*

Kuala Lumpur Office

I confirm my telephone conversation of Saturday 22nd during which I advised you that we now think that we shall be given a 99 year lease for that part of Benteng over which we wish to build. This will enable us to build over and under without hindrance and we believe that there should be no objection if we want the podium to extend upwards for three or four stories. I am told that the premium for this lease is likely to be very nominal.

I have also managed to find out the State Government's ideas on the extra 'development charge' and a figure of 2% has been mentioned or alternatively, we could give up one floor for their use. I do not know how they would plan to utilise the space, and obviously I think we shall need to have a few more details before we commit ourselves. However, now that we have got down to fundamentals, we do not anticipate any further hold up and firm approval should be given fairly soon."

In evidence Smorthwaite explained that he had received indication through Lim that a political donation to UMNO would be in order, that because of the short period that had lapsed between the meeting on 22nd February and the suggestion that a political donation would be in order, he assumed that the donation was connected with their application for land.

There was a second meeting with the accused in his office on 24th July, 1972, attended by Smorthwaite, Lim and several government officials. Smorthwaite had asked for this meeting. The bank's project still seemed to be held up and when he explained this to the accused, the accused requested various officials to proceed as soon as possible. Prior to this meeting Smorthwaite had referred the request for a donation to head office and received their approval in principle. However, no amount had been mentioned. After this meeting, Smorthwaite asked Lim to remain behind and endeavour to find out what sort of sum was expected of the bank. Later in the day Lim advised him that a sum of $250,000 would be acceptable. Smorthwaite agreed to the request. The decision he had to make, having taken the view that the request for a donation was probably connected with the new building, was not so much what the bank might gain by making the donation but what they might lose if they did not.

On the same day immediately after the meeting he wrote a letter, exhibit P15 (page 309), to head office in Hongkong. Part of that letter reads: —

"My dear Mosley,

I refer to my letter of 20th April [exhibit P14].

BANK PROPERTY

Kuala Lumpur Office

We are at last making a breakthrough and I have had successful meetings with the Mentri Besar and the Deputy Governor of Bank Negara.

My meeting with the Mentri Besar was attended by the District Officer, Commissioner of Town Planning, State Development Officers and a few others. In brief, the Mentri Besar commenced by informing the meeting that he was in favour of our new development and that he wanted it settled once and for all with no more arguments. The question of temporary accommodation for the night hawkers was resolved on the spot as was the question of our being given a lease for that part of Benteng over and under which we propose to build. We have not been advised of the premium we shall have to pay for the lease, but we still believe that it will be nominal.

One immediate result of this meeting was that after a certain amount of haggling the 'extra development charge' has been fixed at $250,000 plus $10,000 for sundry expenses. I have taken the liberty of agreeing to these figures and hope this has your approval."

Under cross-examination Smorthwaite said that no mention was made of a donation at the first meeting with the accused on 2nd February, 1972. He repeated that he thought that the short period of time between the first meeting on 22nd February and the request for a donation made in April implied that there was a connection between the donation and the bank's application, even though nothing was actually said, that he regarded it as a gesture of goodwill, not as a bribe and that if a bribe had been suggested he would not have entertained it. As to the second meeting with the accused on 24th July, 1972, he said under cross-examination that after leaving the accused's office and passing Rosedin's office, he told Lim to remain behind to find out discreetly what the amount was to be, that he then returned to the bank, that Lim came to the bank later and reported to him and that he understood, though he could not be definite, that Lim had discussed the matter with Rosedin.

In re-examination he said that he believed that he asked Lim to find out how the money was to be paid and that his answer was in cash, no receipt.

Sim, the deputy manager of the bank, said that one solution to overcome the difficulty over the approval of the bank's application was suggested to the bank in April 1972, by Lim and that was to consider making a donation to party funds, that shortly afterwards the bank was informed that a sum of $250,000 would be acceptable to the accused.

Under cross-examination Sim repeated that the suggestion of a donation was conveyed to the bank

by Lim and that was in about April 1972, and that Sim discussed it with Smorthwaite in Lim's presence.

In re-examination Sim said that he had no reason to doubt the words of Lim with regard to the request for a donation.

Lim's evidence was as follows. He was the architect for the bank. The bank was concerned over the delay in approval of their project. He contacted Chew to try and make an appointment with the accused. Chew arranged a luncheon meeting at which Lim met Rosedin, the accused's political secretary. Eventually, a meeting with the accused was held on 22nd February, 1972, at which the accused was briefed on the bank's project. Present at the meeting with the Chief Minister in his office were Smorthwaite, Lim and Ishak. To the best of his recollection Lim heard accused enquire of the bank their view regarding political donations towards party funds. Lim had the impression that this was mentioned and that the bank's answer was yes, they would contribute and that this was made towards the end of the meeting, but no amount was mentioned.

At the end of this meeting as they were coming out of the accused's room Smorthwaite asked Lim in a whisper to find out what was the amount of the contribution. Lim went to Rosedin's room and asked him. Rosedin said "Wait", left his room, came back and said the amount was $250,000.

Lim went back to the bank and informed Smorthwaite of the amount.

Lim was also present at the second meeting between Smorthwaite and the accused on 24th July, 1972. Also present at the meeting was a number of government officials.

Under cross-examination Lim said that he got the impression at the first meeting on 22nd February, 1972, that the accused might have asked for the bank's view on political donations but he could not be sure and that when coming out of the accused's office he was asked by Smorthwaite to find out the amount.

At the second meeting on 24th July, 1972, with the accused there was no mention of a donation. Lim and Smorthwaite left the room together and Smorthwaite did not ask him to do anything and Lim did not think that he said anything to Rosedin except to thank him.

He did not remember saying that the donation should be in cash, no receipt.

What did Rosedin say in his evidence? He is a State Assembly-man and had been the accused's political secretary since September 1969.

He attended a luncheon arranged by Chew to meet Lim to discuss problems relating to the bank's project. About a week or ten days later he sent a letter, exhibit P12, fixing the time and place of the first meeting between the bank and the accused held on 22nd February, 1972. He himself did not take part in the meeting.

Under cross-examination, Rosedin said that after that meeting Lim came into his room, Lim did not mention a donation to him and Lim did not tell about anybody having asked him or the bank about any donation. Rosedin did not see Lim again until 16th August, 1972 when Lim came to deliver $25,000 and between the first meeting and 16th August, 1972, the accused did not tell Rosedin to ask the bank or Lim for any donation.

Thus it will be seen from the above review of the evidence regarding the first charge of corrupt soliciting that there is no direct evidence that the accused did any soliciting. None of the bank officials said that the accused did so. Only Lim said so, and he said that the accused did so at the first meeting with the bank on 22nd February, 1972 when he asked what was the bank's view regarding political donations towards party funds. Smorthwaite who was present at that meeting said that there was no mention of donations then. Ishak the quantity surveyor's representative who was present at the meeting was not called by the prosecution, who however offered him to the defence. The only other person present, the accused, denied soliciting. Rosedin did not attend the meeting, he was in an outer office and he said that after that meeting Lim came into his room and did not mention any donation, which he heard of for the first time only on 16th August, 1972.

Immediately after that meeting Smorthwaite wrote to head office in Hongkong the letter exhibit P13 (page 304) in which he referred to the meeting but said nothing about any donation.

The trial judge held that probably the first mention of a donation was in April, because of the letter dated 24th April, 1972, exhibit P14 (page 306) which Smorthwaite wrote to head office in Hongkong which for the first time mentioned "the State Government's ideas on the extra 'development charge' ", without mentioning a figure.

The figure of $250,000 was mentioned for the first time only in the letter P15 dated 24th July, 1972, page 309. So it is probable that Lim was mistaken as to the time when if at all the accused mentioned the possibility of the bank making a donation to UMNO and that if at all it was mentioned it must have been mentioned not at the first meeting nor at the second meeting on 24th July, 1972, when there were other government officers present, but probably between the first meeting and the writing of the letter P14 on 24th April, 1972.

No doubt, as Mr. Chelliah says, Lim's evidence should be scrutinized with great care, because for one thing he stood to gain from the success of the bank's project (his fee being 5% of the cost which was estimated at $27m) and in our judgment the judge did scrutinize his evidence and indeed the evidence of everybody else with great care, and came to the conclusion (page 231) that

"Peter Lim may have given a display of faulty memories of events that transpired years before, but after watching his demeanour in the witness box and anxiously scrutinising his answers in cross-examination I am satisfied that he is telling what is substantially true."

As the judge has amply shown in his judgment that he was aware that Lim's evidence should be

examined with great care and that it should be corroborated, it is quite open to him to base his conclusion on Lim's uncorroborated evidence if he believes it, as he has done here, and we would therefore be loth to disturb his finding that the accused did solicit a donation from the bank.

Mr. Chelliah submits that the omission of the prosecution to call Encik Ishak, the quantity surveyor's representative who was present at the first meeting in the accused's room on 22nd February, 1972, makes the verdict unsafe to uphold. We think it right to suppose that if Ishak had anything in support of the prosecution he would have been called and that he was not called because he did not have anything useful to contribute. As he would have been expected to testify as to things that had happened several years previously, we think that in the circumstances it was not unreasonable of the prosecution to merely offer him to the defence.

Mr. Chelliah took us through the evidence of the principal witnesses with a toothcomb and exposed many inconsistencies and contradictions particularly in the evidence of Smorthwaite and Lim as to what happened as they were leaving the accused's office after the two meetings, and submitted that these contradictions destroy completely the case for the prosecution. We are of the opinion that the judge was aware of the contradictions and considered them with great anxiety and that it would be wrong of us to disturb his finding based on a careful assessment of the oral evidence of witnesses whom he had the advantage of seeing and hearing. Also as he said, if Lim had been a dishonest witness he could easily have given evidence to match perfectly that of Sim and Smorthwaite because Sim gave evidence on Friday, 23rd April, Smorthwaite on Monday 26th and Tuesday 27th April and Lim on Wednesday, 28th April. The trial was extensively reported in the press and the fact that Lim chose to say what he said in evidence showed to the judge that Lim, a professional man, was an honest witness speaking as to events that had happened four years previously.

Did the accused accept the money?

There was ample evidence that the accused did accept it, as to $25,000 on 16th August, 1972, through Ahmad Razali at the airport prior to his departure for the Munich Olympics, and as to $225,000 on 27th March, 1973. Receipt of the first sum is evidenced by Ahmad Razali and by the official UMNO receipt supplied a few days later to him. Receipt of the second sum is evidenced by records kept in the bank by witnesses other than Smorthwaite and Sim, witnesses who cannot be regarded as accomplices.

There was a suggestion that the second sum accepted was not passed on to UMNO, probably because an official UMNO receipt was given for the first sum but none for the second and also because Rosedin through whom the second sum was paid said that after receiving it he handed it over to the accused and that the accused gave him no instructions about it. By implication the judge accepted this suggestion, because he ordered that an amount equal to the second sum be paid by the accused to UMNO Selangor. We think however that probably the accused had paid this money to UMNO account, because when confronted by the original of the pay-in slip showing that on 27th March, 1973, $220,000 had been paid into the UMNO account with the Mercantile Bank, Rosedin admitted that it was he who had paid in that amount. In our opinion this amount must have come from the $225,000 received by the accused from the Hongkong bank that very day.

Apart from the ample evidence, proving that the accused did receive the two amounts, the accused himself never denied having done so, his defence being, as already stated, that he had accepted them honestly.

Did the accused solicit and accept the money corruptly?

The next question is: did the accused solicit and accept the money corruptly, that is, as an inducement for obtaining the approval of the Executive Council to the bank's application for the land?

It is no offence for a Mentri Besar to solicit and accept money for himself or another person honestly, that is unconnected with his official duty.

What is the evidence of corrupt motive?

Some of the evidence had already been given above, as to which the judge was satisfied that some time in April there was a request by the accused for a donation, though the amount was not mentioned until 24th July, as evidenced by Smorthwaite's letter. As already stated, the evidence that it was the accused who solicited came only from Lim and also as already stated, the judge was satisfied that Lim on this point was telling the truth. All this time the accused was aware that the bank had applied for the T.O.L. land and was also interested in Benteng over which they wanted to build a projection.

We now come to the evidence relating to the events of 16th August, 1972.

According to Lim, on that day he received a call from Rosedin to get ready the first $25,000 of the donation. Lim informed Sim, who informed Smorthwaite and authorised payment. Lim collected the money and rang back Rosedin to tell him that he had it ready. Rosedin said he was going to the airport to see the accused off for the Munich Olympics and that Lim could come along. Lim went to the airport where he met Rosedin and told him he had the money. Rosedin introduced him to another gentleman, Ahmad Razali, and asked Lim to hand the money to him. Lim handed the money to Ahmad Razali, who signed a temporary receipt (exhibit P6) prepared by Lim. A few days later Lim received an official UMNO receipt, exhibit P8, by post.

Under cross-examination Lim was emphatic that it was Rosedin who telephoned him, not the other way around.

Rosedin on the other hand said in evidence that on that day when the accused was leaving for Munich he (Rosedin) received a phone call from Lim saying that he had $25,000 being a donation to UMNO; that Rosedin told Lim that the accused was at the airport; that if Lim wanted to give the money he should go

there; that Rosedin arrived at the airport and 10 or 15 minutes later Lim also arrived and told Rosedin that he had brought the $25,000; that Rosedin told the accused; that the accused instructed Rosedin to see Ahmad Razali, secretary of Selangor UMNO, to receive the money from Lim that Rosedin took Lim to see Ahmad Razali and introduced him and told Ahmad Razali to accept the money from Lim; and that Ahmad Razali went to see Datuk Harun, returned and accepted the money from Lim.

Under cross-examination, Rosedin insisted that on 16th August, 1972, it was Lim who telephoned him, not the other way around and said that that was the first time he heard about a donation from the bank and that between the first meeting on 22nd February, and 16th August, 1972, the accused did not tell Rosedin to ask the bank or Lim for a donation.

This is what Ahmad Razali said in his evidence. At the time he was State Assemblyman and member of the Executive Council, Selangor, and since 19th April, 1976, Deputy Mentri Besar. On 16th August, 1972, he was at the airport to send the accused off to Munich. Rosedin told him that the accused had instructed Rosedin to tell the witness that the witness could accept $25,000 cash from Lim. The witness went and spoke to the accused softly and asked whether it was true that the accused had told Rosedin that the witness could accept cash $25,000 from Lim. The accused replied to the witness "as a donation for UMNO and keep it in the bank." After that Rosedin introduced the witness to Lim and said Lim could hand the $25,000 cash over to the witness, which Lim did. Lim made out a temporary receipt and the witness signed it, exhibit P6. The witness took the money home and on 28th August, 1972, paid it into the account of UMNO Selangor with the Mercantile Bank. On the following day the witness handed an official UMNO receipt, exhibit P5, to Rosedin.

We now turn to the evidence relating to the bank's application for the land.

Immediately after the bank's first meeting with the accused on 22nd February, 1972, Smorthwaite wrote to head office in Hongkong the letter exhibit P13 (page 304), in which he stated in the 3rd paragraph that things would henceforth move a little faster than previously. That paragraph reads: —

"All this may take time although the Chief Minister had already summoned the various authorities concerned before we left his office, so it may well be that things will now move a little faster than previously. The main thing is that we have the agreement in principle of both the Federal and State Governments and now that we have got beyond the departmental stage, we should be in a position to submit our drawings to the town planners in the not too distant future."

On 7th March, 1972, the application concerning the T.O.L. land was still under consideration by the Land Office. As already stated, in April 1972, the request for a political donation was communicated to the bank officials. On 4th July, 1972, the Standing Committee of the Executive Council which processed all land applications recommended to Executive Council approval of the bank's application for alienation of the T.O.L. land. The accused who normally presided over the meetings of the Committee did not attend that meeting but nothing turned on this. On 7th July, 1972, he summoned the Chief Administrative Officer, Bandaraya, and a number of Government officials to discuss the bank's building project.

On 13th July, 1972, the accused presided at a meeting of the Executive Council to consider, among other things, the bank's application for the T.O.L. land which, be it noted, has been recommended by the Standing Committee for approval. Notwithstanding this the Executive Council deferred decision on it. In the lower court the Solicitor-General contended that this deferment was significant, because the Standing Committee having recommended approval the Executive Council could have approved the application then and there, but did not do so in order to force the bank to pay, though only the accused knew of the donation. Mr. Chelliah on the other hand, argued that the decision to defer was a wise one since the bank was also interested in applying for part of Benteng and therefore the two applications should be considered together.

Be that as it may, the matter was still not resolved. Smorthwaite therefore asked for the second meeting (24th July, 1972). He got the impression that problems relating to the project were resolved on the spot. Writing to head office immediately after the meeting, he reported in letter, exhibit P15 (page 309):

"The Mentri Besar commenced by informing the meeting that he was in favour of our new development and that he wanted it settled once and for all with no more arguments."

As already stated, in the same letter was mentioned for the first time the amount of "extra development charge" expected by the accused from the bank, namely $250,000.

About 20 days after that meeting, that is on 16th August, 1972, when the accused was leaving for Munich, words came from his office that a sum of $25,000 was needed on that day, which sum was paid by the bank through Lim to Ahmad Razali on the accused's advice.

To return to what happened in the Land Office. On 7th August, 1972, the Collector of Land Revenue, Kuala Lumpur, ("PHT KL") informed the bank of the Executive Council's decision to defer determination of the bank's application for the T.O.L. land and said that the application would be reconsidered when the bank had made a formal application for alienation of part of Benteng. On 21st August, 1972, the bank's architect wrote to the Commissioner of Lands & Mines ("PT&G") enclosing a copy of the plan of the state land on Benteng which the bank wished to apply for. On 14th October, 1972, the bank's architect submitted their plans of the building to be constructed, to Bandaraya. On 18th October, 1972, PT&G forwarded the architect's letter of 21st August, 1972, to PHT KL with a copy to the architect directing him to communicate direct with PHT KL. On 3rd November, 1972, there was a minute in the Land Office file, P9A, directing one Johari to send the application form urgently. The minute following that was to this effect, that the writer had discussed with one Mohd. Din of the bank on 4th December, 1972, and that the forms had been handed to him for necessary action and that the Land Office was to

wait for them to be returned. It was about this time that the bank asked for and received a message that the accused wished them to issue a receipt for the balance of $225,000. It was also during this period (23rd January, 1973) that the accused phoned PHT KL to expedite the bank's application and to treat it as a matter of urgency. On 30th January, 1973, the bank made a formal application for the state land on Benteng, measuring 3,800 sq. ft.

We now return to events within the bank.

After paying the accused, through Lim, on 16th August, 1972, the bank had a balance of $225,000.

Smorthwaite said that he believed that he asked Lim to find out how the money was to be paid and that his answer when he came back to the bank was in cash, no receipt. Smorthwaite instructed the bank's accountant to buy a small tin box with a padlock and put the money into it and keep it until required by the Chief Minister's office. This was the bank's idea, not the accused. After a considerable period had elapsed Smorthwaite's attention was drawn to the fact that the accountant was still holding this sum in his office. Smorthwaite therefore instructed Sim to ask Lim to find out what the accused wished the bank to do with this money. After a few days Lim came to the office and said that he had been asked to obtain a receipt from the bank for the money. After discussion, Smorthwaite instructed that the box containing the money should be placed in safe custody and registered in the name of the accused.

According to Sim, when the balance of $225,000 was still in the safe later in the year, he was asked what was to be done with this money. He asked Lim to find out. Lim informed the bank that a receipt was required. The bank asked Lim to find out whether it was acceptable to the accused if the receipt was to state one locked tin box contents unknown. Lim subsequently informed the bank that this was acceptable. Accordingly, on 31st January, 1973, the receipt, P19, was issued in favour of the accused for one locked tin box contents unknown to be made available to the accused or his personally authorised representative. On 19th February, 1973, Sim handed the keys of the box to Lim.

According to him, he saw Smorthwaite very often in connection with the project. Smorthwaite raised the question of what to do with the balance of the donation. The bank felt that they had inconvenienced him (Lim) sufficiently and they suggested that the balance should be put in a box and that the accused or his representative could collect it at any time without referring to Lim. They handed Lim the keys of the box and a receipt to be passed on to Rosedin. On 20th February, 1973, Lim handed over the keys to Rosedin who gave him a receipt on the accused's letterhead, exhibit P7 (page 297).

There was ample undisputed evidence that on 27th March, 1973, Rosedin came to the bank to collect the contents of the tin box which he checked and found to be $225,000, and that Rosedin went back to his office and gave the money to the accused.

As already stated, there was a dispute as to whether this money was paid into UMNO Special Fund account with the Mercantile Bank, and in our judgment it is probable that the $220,000 paid into that account on the same day came from the $225,000.

To return to the Land Office. After the whole of the promised sum of $250,000 had been paid to the accused, on 18th October, 1973, the Executive Council gave formal approval of the bank's application for the T.O.L. land and part of Benteng and the bank was notified of the approval on 23rd November, 1973.

On the above evidence the judge was satisfied that the money was solicited and accepted not innocently, but corruptly.

With respect we do not think that it would be right for us to disturb the judge's finding.

As early as 22nd February, 1972, the accused already knew that the bank was interested in the T.O.L. land and in part of Benteng, and as Mentri Besar he was in a position to frustrate or approve the bank's project.

When Lim came to hand over the $25,000 at the airport on 16th August, 1972, the accused did not appear surprised. His conduct showed that he had prior knowledge of a donation solicited from and promised by the bank.

The accused's conduct regarding the balance of the donation also pointed to his guilt, as the judge found. When the accused received the money in the black tin box kept for him in the bank, on 27th March, 1973, why did he not give an official UMNO receipt as was done for the amount previously received at the airport? It is true that he eventually paid all that amount, less a small deduction, into the UMNO Special Fund account. But nevertheless, if the money received had been a straightforward political donation, with no strings attached, why did he not receive it openly, as the present Prime Minister did when he accepted a political donation of $150,000 from Malayawatta two months before the last general election (page 194), and by cheque which he as a lawyer and Mentri Besar of a very important state must have known an old established bank would have preferred.

The evidence of an accomplice may be corroborated by the conduct of the accused, and we are of the opinion that the judge was right, on the basis of the accused's conduct, in concluding that the accused was guilty.

Earlier we stated that in our view the judge should not have allowed reference to the two cheques P44 and P45; but in our view, even apart from these two cheques, there was enough evidence to support the judge's finding of guilt.

It will also be observed that in our analysis of the evidence we have made no reference to the statement given by the accused to Mr. Sebastian, exhibit P10 which, agreeing with the judge, we think admissible. We have made no reference to it, because in our view it is rather a colourless one and does not help the prosecution one way or another.

For the above reasons, we would dismiss this appeal.

CROSS-APPEAL

We now turn to the cross-appeal by the Public Prosecutor against the acquittal at the end of the prosecution case of the accused on two charges alternative to the second and third main charges. These charges read as follows:

"*Alternative to second charge:* That you on or about August 16, 1972, at the Kuala Lumpur International Airport, Subang, in the State of Selangor, to wit, Mentri Besar Selangor, did corruptly accept from the Hongkong and Shanghai Banking Corporation for a political party, namely, United Malays National Organisation (UMNO), a gratification, to wit, twenty-five thousand dollars ($25,000) cash through one Haji Ahmad Razali bin Haji Mohd. Ali as an inducement for showing favour in relation to your principal's affairs, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961.

Alternative to third charge: That you on or about March 27, 1973, in your office in Kuala Lumpur, then in the State of Selangor, being an agent of the Ruler of the State of Selangor, to wit, Mentri Besar Selangor, did corruptly accept from the Hongkong and Shanghai Banking Corporation, Kuala Lumpur, for a political party, namely, United Malays National Organisation (UMNO), a gratification, to wit, two hundred and twenty-five thousand dollars ($225,000) cash as an inducement for showing favour in relation to your principal's affairs, to wit, to obtain the approval of the Selangor State Executive Council in respect of an application of the said bank for alienation of a piece of State land held under T.O.L. 6450 for the purpose of amalgamating the land applied for with Lots 76, 77 and 78, Section 11, Bandaraya Kuala Lumpur and to construct thereon a multi-storey building and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961."

It is to be noted that the second and third main charges allege offences contrary to section 9(b) of the Prevention of Corruption Act, 1961, while the charges alternative to them allege offences contrary to section 4(a).

Section 4(a) in so far as material reads:

"If any agent corruptly accepts from any person for himself or for any other person any gratification as an inducement for showing favour to any person in relation to his principal's affairs... he shall be guilty of an offence...."

Section 9(b) in so far as material reads:

"Any person who being a member of any public body accepts any gratification as an inducement for the member aiding in procuring any official act... shall be guilty of an offence...."

Was the accused an agent?

In the circumstances of this case, the ingredients to prove an offence under section 4(a) and an offence under section 9(b) are the same, except that under section 4(a) it must be proved that the accused was an agent while under section 9(b) that he was a member of a public body. We agree with the Solicitor-General that the words "for himself or for any other person" may be read into section 9(b) between the words "accepts" and "any".

The judge did not say why he did not call upon the accused for his defence on the alternative charges, and it would appear that, though satisfied that the accused was a member of a public body, namely the State Government of Selangor, he was not satisfied that he was an agent, and the learned Solicitor-General argues that in law the accused was an agent within section 2 of the Act.

An agent is defined by section 2 as meaning —

"any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving under any public body...."

while a public body is defined by the same section as including —

"(a) the Government of Malaysia;
(b) the Government of a State;
(c) any department, service or undertaking of the Government of Malaysia or a State."

The argument on behalf of the accused that he was not an agent runs on the following lines. The Sultan is not free to appoint anybody he likes as Mentri Besar, he may only appoint as Mentri Besar a member of the state legislature who in his judgment is likely to command the confidence of the majority in the assembly (so he is not appointed in the true sense by the Sultan), he does not hold office at the pleasure of the Sultan, and the fact that he is paid out of public funds does not make him an employee or an agent acting for the Sultan any more than the receipt from public funds of his own civil list makes the Sultan an employee or agent of his Government. It is true that as regards the power to dispose of state land (which is vested in the Sultan), the Executive Council (of which the presiding officer is the Mentri Besar) advises the Sultan, but on this and on other matters the Sultan must act on that advice and members of the Executive Council are collectively responsible not to the Sultan but to the State Assembly, and so it is clear, according to this argument, the accused was not employed by or acting on behalf of the State Government nor a person serving under it.

In any event it is said that the alternative charges alleged that the accused was an agent of the Ruler, not of the State Government.

We have studied the cases cited on this point, namely *Regina* v. *Jones*,[33] *Wee Toon Boon* v. *Public Prosecutor*,[34] *Regina* v. *Barrett*,[35] *Henley* v. *Mayor of Lyme*,[36] *King* v. *Whitaker*[37] and *Rex* v. *Vaughan*,[38] and have come to the conclusion that a Mentri Besar is an agent of the State Government.

The question whether the accused was an agent for the purposes of section 2 must be determined by construing the words of that section and by applying the section to the holder of the office of Mentri Besar, as was done in the case of the holder of the office of additional Superintendent Registrar in *Regina* v. *Barrett*,[35] a decision of the English Court of Appeal.

The accused was appointed by the Sultan to look after the affairs of the state, and the fact that he cannot be dismissed at pleasure does not make him any the less an employee of His Royal Highness. When the accused made decisions relating to state affairs he did so on behalf of the Sultan, since article L of the state constitution provides that the executive authority of the state shall be vested in His Royal Highness. When as a member of Executive Council advising approval of the two applications of the bank the accused was in fact acting on behalf of the Sultan,

since under the National Land Code the power to dispose of state land is vested in the Sultan, and the fact that under the state constitution the Sultan must accept that advice does not make the accused any the less an agent acting for His Royal Highness. Similarly the accused was a person serving under the Sultan, despite the fact that the Sultan cannot dismiss him nor reject his advice.

All functions performed by the accused in relation to the state were functions of the Sultan as symbol of the State Government. Like the Minister of State in *Wee Toon Boon* v. *Public Prosecutor*[34] the accused too, in the performance of his duties as Mentri Besar, was clearly acting for the Sultan's Government, it being necessary for the Government to exercise its functions through some human agency, and in receiving remuneration for the performance of his duties and the discharge of his responsibilities as Mentri Besar he clearly was a person employed by or serving under the Sultan.

We are of the opinion that in the circumstances of this case the Sultan and the State Government are synonymous.

We would therefore agree with the Solicitor-General that the accused was an agent within section 4(a). But in the circumstances of this case we do not think it proper to order that the accused be convicted under that section also — because (1) he had not been called upon for his defence and it is conceivable that he might have had some explanation and (2) if convicted after making such defence, the proper sentences would have been the same as on the principal charges and the sentences on the principal and alternative charges should run concurrently. We understand that the Solicitor-General is more interested in a ruling on the word "agent" than in increasing the number of convictions.

Additional penalty

The second ground of the cross-appeal is that the judge erred in law in ordering that $225,000 be paid by the accused to UMNO Selangor and that he should have ordered that the whole of the sum of $250,000 be paid to the Federal Government.

The facts relevant to this ground are as follows. The prosecution alleges and proves that the accused on 16th August, 1972, accepted $25,000 from the bank at the airport. The prosecution also alleges and proves that the accused through Rosedin collected $225,000 from the bank. On convicting the accused, the judge ordered that the accused pay $225,000 to UMNO Selangor. Obviously he was acting under section 13 of the Prevention of Corruption Act which reads: —

"13. Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money... the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within the time and to the body and in the manner specified in the order, a sum which is equal to the amount of the gratification... and any such penalty shall be recoverable as a fine."

The above section has been considered by this court twice, in *Mohamed bin Long* v. *Public Prosecutor*[39] and in *Lee Mun Foong*.[40]

We are of the opinion that the above provision is very clear. Where a court convicts a person of an offence committed by the acceptance of a sum of money by way of gratification, then it shall, *in addition to* imposing any other punishment, order him to pay as a *penalty* within the time and to the body and in the manner specified in the order, a sum equal to the amount of the gratification. Accordingly, we are of the opinion that the correct order that should have been made here is that the accused pay it not to UMNO, but, as contended by the Solicitor-General, to the Federal Government, as the administration of criminal justice is a federal subject. Accordingly, instead of the judge's order which is hereby set aside, there shall be an order that the accused within one month of this order pay as a penalty, in addition to the sentence of imprisonment, $250,000 to the Federal Government, that sum to be recoverable, in the words of the section, as a fine.

The appeal is dismissed, the cross-appeal is allowed and the convictions are upheld and the sentences affirmed, except, as already stated, as to the amount of $250,000.

Appeal dismissed. Cross-appeal allowed.

Solicitors: *R.R. Chelliah Bros.*